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No. 08-

IN THE

# Supreme Court of the United States

NATIONAL MINING ASSOCIATION,
*Petitioner*,

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, *et al.*,
*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Surface Mining Control and Reclamation Act (SMCRA) limits mining on certain lands, but expressly protects the property interests of those with "valid existing rights" to mine coal. That key statutory phrase—"valid existing rights"—appears in one formulation or another in more than 100 federal statutes. Despite the phrase's lengthy pedigree and the settled expectations of the coal industry and other owners of interests in land, the D.C. Circuit declared the phrase ambiguous, deferring to a counter-textual interpretation promulgated by the Office of Surface Mining Reclamation and Enforcement (OSM) that vitiated property owners' rights throughout the Nation. The court reached this result by relying on a new rule of statutory construction: A common statutory phrase is categorically ambiguous if just one word in that phrase—here, the word "rights" in the phrase "valid existing rights"—has multiple dictionary definitions.

The questions presented are:

1. Whether the D.C. Circuit correctly held—in conflict with this Court's precedents—that a statutory phrase is necessarily ambiguous and triggers *Chevron* deference because a single word within that phrase is itself ambiguous.

2. Whether the D.C. Circuit correctly declined to narrow OSM's statutory construction even though its interpretation will trigger takings claims.

## PARTIES TO THE PROCEEDINGS

Petitioner is the National Mining Association (NMA). NMA was the plaintiff in the District Court and appellant before the United States Court of Appeals for the District of Columbia Circuit.

Respondents Dirk Kempthorne, Secretary of the Interior, United States Department of the Interior, and Brent Wahlquist, the Director of the Office of Surface Mining Reclamation and Enforcement, were defendants in the District Court and appellees before the United States Court of Appeals for the District of Columbia Circuit.

The National Wildlife Federation, Citizens Coal Council, National Trust for Historic Preservation in the United States, and Kentucky Resources Council, Inc., were intervenors-defendants in the District Court and intervenors-appellees in the United States Court of Appeals for the District of Columbia Circuit. The National Council of Coal Lessors, Inc., also filed an *amicus* brief in support of NMA in the court of appeals.

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DIRK KEMPTHORNE, SECRETARY
OF THE INTERIOR, *et al.*,
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**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI

The National Mining Association (NMA) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The opinion of the D.C. Circuit affirming the District Court's dismissal of NMA's challenge to OSM's "valid existing rights" rule is reported at 512 F.3d 702 and reprinted in the appendix hereto (App.) at 1a. The memorandum opinion of the District Court is unpublished and is reprinted at App. 17a.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 2008. App. 1a. A timely petition for panel rehearing and rehearing *en banc* was denied on March 14, 2008. App. 37a-38a. On June 4, 2008, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari, to and including July 12, 2008. App. 39a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V.

Section 522(e) of SMCRA provides in relevant part: "After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted [in areas designated in subsections (1)-(5)]."

## INTRODUCTION

When it enacted SMCRA, Congress established a federal regime to regulate coal mining. Among other things, the Act banned surface coal mining operations on certain federal, state, and private lands. But Congress was careful to craft an important exception to this otherwise categorical ban: mining could continue on lands in which miners held "valid existing rights," commonly referred to as VER.

VER clauses similar to the one codified in SMCRA are a commonplace in federal land-use regulations. Over the past century, Congress and the Executive

have used the same or a substantively similar phrase in over 100 statutes and proclamations for generally the same purpose: to protect pre-existing property rights from being impaired by subsequently enacted policy changes. VER clauses thus represent a critical safeguard for the many owners of property rights in lands that supply this Nation's critical natural resources—such as minerals, oil, gas, and timber.

The ruling below, however, threw the significance of this safeguard into serious doubt. It did so by upending the conventional understanding of VER clauses as protecting property rights. The D.C. Circuit determined that it would defer to OSM's conclusion that SMCRA's VER protects only "property-rights-*plus-permits*"—only those property rights on which the holder had also secured (or made a good faith effort to secure) permits *before* the affected land came within SMCRA's ambit.

OSM's "property-plus" interpretation of VER was unique; but the D.C. Circuit's analysis of OSM's regulation was as unprecedented as OSM's interpretation itself. Purporting to apply the methodology established in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals bestowed an expansive new measure of deference on agency interpretations of the statutes they administer by effectively deferring to the agency in determining *whether a statute is ambiguous*. Instead of deploying the familiar tools of statutory construction to unlock the meaning of the key statutory term—"valid existing rights"—the court declared it ambiguous, and the agency's interpretation deserving of

deference, because the lone word "rights" has various dictionary definitions. But just about *any* statutory phrase can be deemed "ambiguous" based on the definitional possibilities of the individual words it comprises. And this Court has made quite clear that statutory interpretation requires more than the isolated review of a single word of text, and that statutory ambiguity does not hinge on abstract definitional possibilities.

The D.C. Circuit's extreme brand of *Chevron* deference is not only in deep conflict with this Court's precedents; it raises significant constitutional doubts. OSM selected—and the court of appeals uncritically approved—an interpretation of SMCRA's VER clause that OSM forthrightly acknowledged would pose "significant takings implications." 64 Fed. Reg. 70,766, 70,781 (Dec. 17, 1999 final rule). But in approving OSM's interpretation, the D.C. Circuit expressly declined to apply the rule articulated by this Court in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.5 (1985), that an agency's statutory construction that threatens a taking should be construed narrowly to alleviate that concern. The court's decision not only conflicts with *Riverside Bayview Homes* itself; it exacerbates a rift among the circuit courts, which have long struggled to understand and apply the canon. The *Riverside Bayview Homes* rule now appears to be a dead letter in the D.C. Circuit; it is hard to imagine the circumstances in which the rule *would* apply, if not where OSM extensively catalogued the takings its preferred interpretation would cause, *and* where

courts, including this one, have recognized that SMCRA's VER clause does not compel that result.

The Court should grant certiorari to dispel the confusion the D.C. Circuit has introduced into the proper application of the *Chevron* methodology. And the Court should also undertake to provide the lower courts with needed guidance on the proper application of the *Riverside Bayview Homes* rule.

## STATEMENT OF THE CASE

### A. Factual Background

1. Enacted in 1977 after years of protracted debate, the Surface Mining Control and Reclamation Act (SMCRA or Act), Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201 *et seq.*), is a "comprehensive statute" that establishes a "nationwide program" to address surface coal mining. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 268 (1981); *accord National Wildlife Fed'n* v. *Hodel*, 839 F.2d 694, 701 (D.C. Cir. 1988). That nationwide program provides for federal regulation of land-use activities that are traditionally under state and local control. *See Hodel*, 452 U.S. at 289 (explaining that "the Act * * * prescribes federal minimum standards governing surface coal mining, which a State may either implement itself or else yield to a federally administered regulatory program"); *id.* at 269-272 (outlining SMCRA provisions).

With the Act, Congress aimed to "strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f); *see also Citizens Coal Council* v. *Norton*,

330 F.3d 478, 480 (D.C. Cir. 2003). SMCRA thus promotes twin objectives: "protect society and the environment from the adverse effects of surface coal mining operations," 30 U.S.C. § 1202(a), and "assure that the coal supply essential to the Nation's energy requirements, and its economic and social well-being is provided," *id.* at § 1202(f).

Congress's careful balancing of these social and economic interests is most clearly evident in Section 522(e) of SMCRA. That provision designates a host of areas off-limits for surface–coal-mining operations. *See* 30 U.S.C. § 1272(e). But the provision also contains exemptions that serve SMCRA's second objective: preserving the availability of critical coal resources essential to our energy needs. *See id.* Section 522(e) exempts from the otherwise categorical ban on mining in statutorily designated areas two classes of property: existing mining operations and areas "subject to valid existing rights." *Id.*

2. Congress did not coin "valid existing rights" in SMCRA. It and the Executive have deployed VER clauses in well over 100 federal statutes and proclamations during the past century to protect rights in property from destruction by federal land-use enactments.[1] The United States Code is replete

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[1] *See* Jan G. Laitos, *The Nature & Consequence of "Valid Existing Rights" Status in Public Land Law*, 5 J. Min. L. & Pol'y 399, 403-406 & n.20 (1989) (noting that "[t]he VER phrase appears in over 100 federal statutes"); *see, e.g.*, Proclamation No. 7397, 66 Fed. Reg. 7354, 7356 (Jan. 22, 2001) (establishing Sonoran Desert National Monument "subject to valid existing rights"); Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (Sept. 18, 1996) (establishing Grand Staircase-Escalante National Monument "subject to valid existing rights"); Exec.

with statutes containing VER clauses.[2] They appear in Title 10 (Armed Forces),[3] Title 16 (Conservation),[4] Title 25 (Indians),[5] Title 30 (Mineral Lands and Mining),[6] Title 42 (The Public Health and Welfare),[7] Title 43 (Public Lands),[8] Title 45 (Railroads),[9] and Title 48 (Territories and Insular Possessions).[10] Included among these statutes are provisions governing the acquisition and use of lands under federal management[11] as well as withdrawing lands from private-sector development.[12]

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Order No. 7624, 2 Fed. Reg. 1119, 1119 (May 29, 1937) (order enlarging Tongass National Forest "subject to valid existing rights").

[2] *See* App. 40a.

[3] *See* 10 U.S.C. § 7439(b).

[4] *See, e.g.*, 16 U.S.C. § 47e; *id.* § 80a; *id.* § 90; *id.* § 100c; *id.* § 410bb(c); *id.* § 410aaa-25; *id.* § 539(b); *id.* § 4308(d).

[5] *See, e.g.*, 25 U.S.C. § 293b; *id.* § 575; *id.* § 1780j(a)(1).

[6] *See, e.g.*, 30 U.S.C. § 1281.

[7] *See* 42 U.S.C. § 6502.

[8] *See, e.g.*, 43 U.S.C. § 1223; *id.* § 1610(a)(1); *id.* § 1633(c); *id.* at § 1785(c)(2)(A).

[9] *See, e.g.*, 45 U.S.C. § 1203(b)(1)(B); *id.* § 1210.

[10] *See, e.g.*, 48 U.S.C. § 1545(b)(2); *id.* § 1705(a); *id.* § 1971(a).

[11] *See, e.g.*, Federal Land Policy & Management Act of 1976, Pub. L. No. 94-579, § 701(h) (codified at 43 U.S.C. § 1701 note).

[12] *See, e.g.*, Note, *Regulation & Land Withdrawals: Defining "Valid Existing Rights,"* 3 J. Min. L. & Pol'y 517, 532 (1988) ("Although withdrawals have been numerous and have taken many forms, they invariably have contained language designed to protect existing rights acquired prior to the time of withdrawal. The specific language used has varied, but the

Not surprisingly given their proliferation in federal law, VER clauses impact a wide array of property owners, including diverse industries dependent on natural resources—from mineral and mining,[13] to oil and gas,[14] to forestry.[15] And irrespective of where they appear and what precise verbiage is used to describe the right they guard, VER clauses have been consistently understood to preserve the *status quo ante* by protecting property interests that otherwise would be adversely affected by subsequently enacted federal laws.[16]

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usual phrase preserves valid existing claims or valid existing rights.").

[13] *See, e.g.*, 16 U.S.C. § 460v-4; *id.* § 460q-5; *id.* § 460dd-2(a); *id.* § 460mm-1.

[14] *See, e.g.*, 16 U.S.C. § 460qq(c); *Colorado Envtl. Coal.* v. *Bureau of Land Mgmt.*, 932 F. Supp. 1247, 1249 (D. Colo. 1996) (VER clause in Federal Land Policy and Management Act protected existing gas leases).

[15] *See, e.g.*, 16 U.S.C. § 1604(i); *Forest Guardians* v. *Dombeck*, 131 F.3d 1309, 1312-13 (9th Cir. 1997).

[16] *See, e.g.*, *Seldovia Native Ass'n, Inc.* v. *Lujan*, 904 F.2d 1335, 1343 (9th Cir. 1990) (Alaska Native Claims Settlement Act's protection of "valid existing rights" included open-to-entry leases with conditional purchase options); *Northern Alaska Envtl. Ctr.* v. *Lujan*, 872 F.2d 901, 903 (9th Cir. 1989) (Alaska National Interests Lands Conservation Act's protection of "valid existing rights" included valid patented and unpatented mining claims); *Aleknagik Natives Ltd.* v. *United States*, 806 F.2d 924, 927 (9th Cir. 1986) (Alaska Native Claims Settlement Act's protection of "valid existing rights" included unvested property interests); *Hinton* v. *Udall*, 364 F.2d 676, 678-679 (D.C. Cir. 1966) (Interior Department Order No. 2874's protection of "valid existing rights" included subsurface property rights); *Stupak-Thrall* v. *Glickman*, 988 F. Supp. 1055, 1063-64 (W.D. Mich. 1997) (Michigan Wilderness Act's protection of "valid

Congress had the same purpose in mind when it protected "valid existing rights" from Section 522(e)'s otherwise *per se* ban on surface coal mining in statutorily designated areas. *See National Wildlife Fed'n*, 839 F.2d at 749 (Congress "limited the application of the surface mining proscriptions to avoid infringement of *existing property rights*." (emphasis added)); *see also id.* at 750 ("Congress did not intend to infringe on valid property rights or effect takings through § 522(e)."). As in other statutes, SMCRA's VER clause is intended to serve a fundamental purpose: to clarify that "*all valid existing property rights must be preserved*" and that Congress "has no intention whatsoever, by any provision of [SMCRA], to change such rights." S. Rep. No. 95-128, at 56 (1977) (emphasis added); *see* H.R. Rep. No. 95-218, at 95 (1977) ("As subsection 522(e) prohibits surface coal mining on lands within the boundaries of national forests, subject to valid existing rights, it is not the intent, nor is it the effect of this provision to preclude surface coal mining on private inholdings within national forests."). In reviewing a pre-enforcement challenge to the constitutionality of SMCRA, this Court similarly signaled as much. *See Hodel*, 452 U.S. at 297 n.37 (finding takings claim "premature" because statute protected "valid existing rights" and explaining that

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existing rights" included riparian rights); *Kile* v. *Belisle*, 759 P.2d 1292, 1298-1301 (Ala. 1988) (Public Land Order 5250's protection of "valid existing rights" included placer mining claims where there is substantial compliance with annual assessment requirements); *cf.* Louis J. Dobbs, 77 Interior Dec. 5, 8 (Jan. 15, 1970) (VER clauses "were designed to prevent the initiation of new claims and not the destruction of rights theretofore fairly earned").

a permit requirement "is not compelled by either the statutory language or its legislative history") (citing H.R. Rep. No. 95-218, at 95 (1977)).

3. Despite the long-standing conventional understanding of VER clauses, the agency charged with administering SMCRA—OSM—has struggled to implement the VER clause in Section 522(e). Since 1977, OSM has vacillated among alternative definitions for the statute's VER clause, only settling on its most recent interpretation in 1999—two decades after SMCRA was enacted. *See* 64 Fed. Reg. 70,766, 70,766 (Dec. 17, 1999 final rule) ("[A]t various times during the past two decades, we have either proposed or adopted all the listed alternative[ definitions of Section 522(e)'s VER clause], plus some variations on these alternatives.").

In its latest regulatory incarnation of Section 522(e)'s VER clause, OSM required a miner seeking to demonstrate VER in a Section 522(e) area to satisfy a two-part test. The first part embodies what the phrase "valid existing rights" has traditionally meant: "a person claiming [VER] must demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests the person, or a predecessor in interest, with the right to conduct the type of surface coal mining operations intended." 30 C.F.R. § 761.5(a). In other words, the miner must hold a valid property right to mine coal in the area before it was placed off limits under SMCRA. *See id.*

But OSM did not stop where the text of the statute stops. The second part of its VER test additionally requires a miner to prove that "[a]ll permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith

effort to obtain all necessary permits and authorizations had been made, before the land came under the protection of" Section 522(e). *Id.* § 761.5(b)(1). Thus, while Section 522(e)'s VER clause says not a word about meeting permitting requirements attendant on surface-coal-mining operations in statutorily designated areas, OSM made that the critical element for establishing VER.[17] *See* 64 Fed. Reg. at 70,778. As OSM explained, its regulation means that VER is not "coextensive or synonymous with property rights"; to the contrary, property rights are a mere "prerequisite for demonstrating VER under the good faith/all permits" standard. *Id.* at 70,774. Section 522(e)'s VER clause therefore does not protect valid pre-existing property rights as so many of its statutory analogs do; it protects "equitable interest[s] in regulatory approval of proposed surface coal mining operations." *Id.* at 70,778.

In a lengthy preamble accompanying its regulations, OSM acknowledged the obvious implication of grafting a "good faith/all permits" plus-factor onto SMCRA's VER clause more than two decades after the statute became law: "[F]ew persons will qualify for VER under this standard." *Id.* OSM further recognized the upshot of adopting a test "few persons" could ever meet: its chosen

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[17] A miner may also demonstrate that "[t]he land is needed for and immediately adjacent to a surface coal mining operation" for which the miner had obtained (or made a good faith effort to obtain) all permits and other authorizations. 30 C.F.R. § 761.5(a)(b)(2). But SMCRA already exempts existing mining operations, which include adjacent lands as well as roads. *See* 30 U.S.C. § 1291(28)(B).

interpretation carried "significant takings implications." *Id.* at 70,781; *accord id.* at 70,827.

Quite right. In fact, of all the alternative VER definitions OSM considered in its rulemaking, the one it adopted had "the *greatest* potential to result in compensable takings." *Id.* at 70,781-82 (emphasis added). OSM also recognized why that was so: Its regulation upsets "underlying property interests" and interferes with "reasonable investment-backed expectations." *Id.* at 70,824. Indeed, while OSM acknowledged that the standard it adopted would prevent mining of thousands of acres in protected areas, *id.* at 70,776, its prediction underestimates the full takings impact of its regulation. OSM's new test will apply not only to areas currently designated under SMCRA but also to areas that later come within SMCRA's protections through future designations or third-party actions. *See National Wildlife Fed'n*, 839 F.2d at 750-751.

OSM fully appreciated that this grave constitutional consequence was in no way compelled by SMCRA, since "neither the statute nor its legislative history mentions a good faith/all permits standard for VER." 64 Fed. Reg. at 70,778. OSM even recognized that its interpretation of Section 522(e)'s VER clause deviated from Congress's historic use of the same term in many other federal statutes, which have been construed to protect pre-existing property rights from takings. *Id.* Yet OSM took the view that other statutes containing the same or substantively similar terms failed to provide any "useful guidance in determining the meaning of VER for surface coal mining operations under Section 522(e) of SMCRA." *Id.* at 70,794.

## B. Proceedings Below

1. After OSM promulgated its "good faith/all permits" rule, NMA—whose members own or lease coal estates in areas protected under SMCRA—challenged the rule in the United States District Court for the District of Columbia. On cross-motions for summary judgment, the District Court granted judgment against NMA and in favor of the Secretary of the Interior. App. 36a. The District Court acknowledged that Congress intended in Section 522(e)'s VER clause "some recognition of applicable state law property rights and an avoidance of takings." App. 31a. It nevertheless found the term ambiguous, App. 32a, and concluded that OSM's interpretation was a permissible construction of the statute. App. 32a-34a.

2. The D.C. Circuit affirmed. App. 1a. Like the District Court, the court of appeals concluded that *Chevron* mandated deference to the Secretary's interpretation of Section 522(e)'s VER clause because it found the clause facially ambiguous. App. 2a. But the panel did not come to its conclusion about statutory ambiguity by applying the traditional tools of statutory construction—*i.e.*, text, structure, context, and purpose—that this Court has long required. App. 7a-11a. It took a far different route: Ignoring the other words that make up the critical statutory term, the other parts of SMCRA, and the other statutes containing the same or similar VER clauses, the court examined just one word—"rights"—and just one source—the dictionary. .

After examining how Black's Law Dictionary treats the word "rights," the court of appeals held that Section 522(e)'s use of the word "rights" constituted a

"major source * * * of ambiguity." App. 8a. Thus, the D.C. Circuit opined that while "rights" may refer to property rights in some circumstances, Congress had used "a word with multiple and often vague meanings" that "will also do service more generally," meaning in turn that "[t]he dictionary counsels in favor of more deference to the agency, not less." App. 9a. While recognizing that the term "valid existing rights" may well "operate[ ]" as a "term of art," the court explained that the term is "a tool by which Congress delegates policymaking authority through ambiguity." App. 10a. With this holding, the panel announced a new and troubling rule: *Chevron* step two is triggered whenever one word in a statute is superficially ambiguous based on its dictionary definitions.

Having found SMCRA's VER clause ambiguous because the word "rights" in isolation is susceptible to various dictionary meanings, the panel found the Secretary's interpretation of the statute reasonable under *Chevron* step two. App. 11a-16a. This is the point at which the court made its second mistake. The court declined to adopt a narrowing construction of OSM's statutory interpretation under *Riverside Bayview Homes* based on its manifest takings implications. App. 15a-16a. The panel agreed in theory that "the canon of constitutional avoidance can[not] be ignored with respect to every argument sounding in the Takings Clause"—but nevertheless concluded that no such issues were raised in this case, because "NMA has shown no 'identifiable class' of miners whose takings claims would expose the Treasury to such liability." App. 16a. The court

therefore applied the "usual *Chevron* analysis" and deferred to the Secretary's interpretation.

NMA timely petitioned for rehearing and rehearing *en banc*. The D.C. Circuit denied both requests. App. 37a-38a.

## REASONS FOR GRANTING THE WRIT

### I. THE RULING BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

1. The D.C. Circuit deferred to the Secretary's interpretation of SMCRA's "valid existing rights" clause because a single word in that key phrase—"rights"—has multiple entries in the dictionary. With that unique approach to statutory interpretation under *Chevron*, the D.C. Circuit effectively enshrined a new measure of deference in the interpretative process where none had previously existed and where none properly belongs—*i.e.*, in determining whether a statute *is* ambiguous in the first place. App. 7a-11a. An interpretative approach that focuses exclusively on abstract definitional possibilities as the touchstone of statutory ambiguity can be expected to produce a delegation of authority to the agency in just about every case. Not only does that approach squarely conflict with *Chevron*, but it also poses grave separation-of-powers concerns by allowing Executive Branch agencies to trump Congress's otherwise clear intent. That is why this Court has held time and again that "deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 600 (2004); *see Adams*

*Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). The panel's key supposition—that the isolation and sterile examination of one word in a statute can trigger statutory ambiguity sufficient to constitute a delegation of lawmaking authority to an administrative agency—thus stands in sharp conflict with this Court's teachings.

To begin with, neither this Court's precedents nor common sense allow *any* statutory interpretation to hinge exclusively on the isolated review of a single word contained in the statute that has various definitions in common usage. *See Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("[A] word is known by the company it keeps."). As this Court has explained, " '[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used[.]' " *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 25 n.6 (1988) (quoting *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Hand, J.)). For that basic reason, this Court has sensibly held that "statutory language cannot be construed in a vacuum"; instead, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and

the broader context of the statute as a whole."); *King* v. *St. Vincent Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.").

This Court has repeatedly put to practice this conventional approach to statutory interpretation, and did so again recently. In *Dolan* v. *United States Postal Serv.*, 546 U.S. 481 (2006), the Court considered whether the Federal Tort Claims Act's postal exception for the "negligent transmission" of mail preserved sovereign immunity for injuries caused by the Postal Service's creation of slip-and-fall hazards by the careless delivery of mail. *Id.* at 486. The Court recognized that, "[i]f considered in isolation," the phrase "negligent transmission" could "embrace a wide range of negligent acts committed by the Postal Service in the course of delivering mail." *Id.* But "[t]he definition of words in isolation * * * is not necessarily controlling in statutory construction," the Court explained, because "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities" depending upon the interpretation of "the whole statutory text, considering the purpose and context of the statute." *Id.* "[N]egligent transmission" did not extend to its definitional limit; the other statutory terms surrounding it constrained its meaning, such that the phrase was more properly interpreted to extend only to injuries arising because mail does not arrive or arrives late, arrives in damaged condition, or at the wrong address. *Id.* at 486-489.

The ruling below cannot be reconciled with *Dolan*. The D.C. Circuit made no attempt to understand the meaning of the word "rights" in the context in which

it was used—*i.e.*, as part of a statutory term of art with a century-old pedigree—or even by reference to the other words surrounding it—*i.e.*, "valid" and "existing." Instead, the court's statutory analysis was entirely "control[ed]" by the existence of multiple dictionary definitions for one word in the statute without any regard for "the whole statutory text." *Id.* at 486. *Dolan* would thus likely have come out differently under the panel's approach: under the D.C. Circuit's test, the Postal Service's creation of a slip-and-fall hazard would constitute the "negligent transmission" of mail for which sovereign immunity is preserved because that phrase in theory can "embrace a wide range of negligent acts." *Id.*

This Court has likewise emphasized that *Chevron* step one requires more than an open-ended hunt for definitional possibilities. *See National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) ("In making the threshold determination under *Chevron*, a reviewing court should not confine itself to examining a particular statutory provision in isolation.") (internal citation & quotation marks omitted). A statute is only deemed ambiguous under *Chevron* after the traditional tools of statutory construction—text, structure, purpose, and context—have been applied and exhausted. *See, e.g.*, *Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

This Court has repeatedly deployed the familiar tools of statutory interpretation to dispel facial statutory ambiguity and to reject administrative

agency constructions inconsistent with plain statutory commands. *See Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (examining Food and Drug Act's text, structure, purpose and history of tobacco legislation and holding FDA barred from regulating cigarettes as "drug" and "device" under *Chevron* step one); *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218, 228 (1994) (applying text and structure to Communications Act and rejecting FCC's construction of "modify" under *Chevron* step one).[18] Take, for one classic example, *Brown* v. *Gardner*, 513 U.S. 115 (1994). In that case, the Court reviewed a Department of Veteran Affairs regulation "requiring a claimant for certain veterans' benefits to prove that disability resulted from negligent treatment by the VA" and ultimately held that it was inconsistent with the controlling statute, which states that the VA will provide disability benefits for an injury that results from VA medical treatment so long as it did not result from the "veteran's own willful misconduct." *Id.* at 116. While the Court recognized that the underlying statute's use of the term "injury" "can of course carry a fault connotation" in common usage, it reasoned that statutory "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Id.* at 117-118. And after closely reviewing the statutory context as well as "[t]extual cross-reference[s]" to other veterans' benefits statutes and "analogous statutes dealing with

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[18] *See, e.g., Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 42-43 (1990) ("Because we find that the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation.").

service-connected injuries" employing the word "injury," the Court held that the statute "negate[d] a fault reading." *Id.* at 118-119. The Court therefore held that because "the text and reasonable inferences from it give a clear answer," that "is the end of the matter"—the regulation could not stand. *Id.* at 120.

Notwithstanding the Court's holding in *Brown* that mere "definitional possibilities" do not give rise to statutory ambiguity under *Chevron*, the D.C. Circuit deferred to OSM's interpretation of Section 522(e)'s VER clause *precisely because* the word "rights" admits of multiple "definitional possibilities." The result in *Brown*, just like the result in *Dolan*, would thus have been different under the D.C. Circuit's rule: Deference would have been given to the VA's regulation simply because "injury," standing alone, has multiple definitions. There would have been no need to enlist the aid of any statutory construction tools to test the statute's meaning—and no resolution of the issue at *Chevron* step one.

2. Trading venerable tools of statutory construction for heightened agency deference based on dictionary construction also led the court of appeals to dismiss Congress's long track record with VER clauses like the one in Section 522(e). *See supra* at 6-8. Rather than examine that phrase's rich history and recognize that both Congress and property owners have relied on VER's settled meaning, the D.C. Circuit got its rules of construction backwards. According to the court of appeals, a "term of art" like "valid existing rights" is merely "a tool by which Congress delegates policymaking authority through ambiguity." App. 10a. This proposition—that the more Congress uses a term, the less settled its

meaning becomes—appears to have no known provenance (aside, perhaps, from Lewis Carroll). And for good reason: It inverts this Court's presumption that "when Congress uses the same language in two statutes having similar purposes * * * it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005) (plurality); *see McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) (when a statute uses a term of art, "Congress intended it to have its established meaning"); *Hawaiian Airlines, Inc.* v. *Norris*, 512 U.S. 246, 254 (1994); *Gilbert* v. *United States*, 370 U.S. 650, 658 (1962); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).[19]

Applying this presumption, this Court frequently looks to Congress's record of statutory usage for assistance in interpreting common statutory terms.[20]

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[19] *See generally* 2B Norman J. Singer, *Sutherland Statutory Construction* § 51:2 (7th ed. 2008) ("It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. * * * [T]he new provision is presumed in accord with the legislative policy embodied in those prior statutes."); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

[20] *See, e.g., Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998) (noting "ADA's definition of disability is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act"); *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 759 n.2 (1989) ("We have stated in the past that fee-shifting statutes' similar language is 'a strong

In *McDermott*, for example, the Court explained that, while the Jones Act did not define the term "seaman," the term is a "maritime term of art" with a recognized meaning. 498 U.S. at 342. Similarly, in *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83 (1991), the Court held that the allowance of "a reasonable attorney's fee" under the version of the fee-shifting statute for civil-rights litigation then in effect did not encompass fees paid to experts because Congress's "record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost." *Id.* at 88. And in *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932), the Court explained that because the federal Shipping Act, "[i]n its general scope and purpose, as well as in its terms, * * * closely parallels the Interstate Commerce Act, * * * we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application, and effect." *Id.* at 481.

The D.C. Circuit's holding that a century's worth of VER clauses protecting property rights in more than 100 federal statutes actually makes the term "valid existing rights" *more*, not *less*, opaque cannot be squared with cases like *McDermott*, *Casey*, and *United States Navigation Co.* But even beyond that difficulty, the D.C. Circuit's new approach—that Congress's consistent use of a term opens it up to varying meanings based on shifting agency prerogatives—is profoundly troubling on its own

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indication' that they are to be interpreted alike.") (citation omitted).

terms: It effectively compels a court to defer to an agency's interpretative gloss *precisely because* Congress has endeavored to fix the statute's meaning through repeated and consistent use of the same words in the same way. That will undoubtedly cause serious mischief where, as here, an agency administers different statutory schemes that use the same or similar terms. *See, e.g., Environmental Action, Inc.* v. *FERC*, 939 F.2d 1057, 1063 (D.C. Cir. 1991) ("Without more support, and a distinction that justifies the seemingly different approaches that the FERC has taken under two very similar statutes [*i.e.*, the Natural Gas Act and the Federal Power Act], we cannot accept" FERC's conflicting interpretations of two similar provisions). Indeed, because some of the lands designated under Section 522(e) are created or governed under federal laws containing their *own* VER clauses,[21] the D.C. Circuit's approach (and OSM's interpretation) is sure to sow confusion as to which, if any, "valid existing rights" are protected under statutes intended to work together.

3. With its singular attention to the meaning of the word "rights" in the statute, and the new measure of deference that approach afforded, the D.C. Circuit disregarded another essential source of congressional intent: SMCRA's structure. The result was to put yet more distance between the rule adopted by the court of appeals and this Court's precedents. Thus, the D.C. Circuit did not stop to consider the sharp incongruity between OSM's "good faith/all permits"

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[21] *See* 30 U.S.C. § 1272(e)(1); 16 U.S.C. § 1133(d)(3); *id.* § 1280(a)(ii)-(iii) & (b).

plus-factor and the other provisions of SMCRA requiring one with VER to obtain all necessary regulatory permits before mining. *See* 30 U.S.C. §§ 1256-1266 (establishing permit process, requirements, and performance standards); 64 Fed. Reg. at 70,771 & 70,776-77. The fact that Congress elsewhere in the Act required miners *with VER* to *obtain permits* before mining strongly signals that the legislature did not intend to require miners to obtain those same permits to *qualify* for VER in the first place.

Where Congress sought to condition exemptions from SMCRA on the attainment of regulatory permits, moreover, it affirmatively said so. *See* 30 U.S.C. § 1260(b)(5)(B); *id.* § 1260(d)(2); *id.* § 1272(a)(6). Thus, SMCRA exempts from its restrictions on mining operations that adversely impact alluvial valley floors those operations that "had obtained specific permit approval by the State regulatory authority to conduct surface coal mining operations within said alluvial valley floors" one year before SMCRA's enactment. *Id.* § 1260(b)(5)(B). The Act similarly exempts from its restrictions on mining operations in areas containing prime farmland those operations permitted before SMCRA's enactment. *See id.* § 1260(d)(2).

The D.C. Circuit wholly disregarded these telling structural features of SMCRA, effectively announcing that a statute's structure need not be consulted to interpret it. But this Court has always required courts to read statutory provisions together to glean their meaning. *See, e.g., Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (noting "longstanding practice of construing statutes

*in pari materia*"); *Riverside Bayview Homes*, 474 U.S. at 139 n.11 (explaining that "various provisions of the [Clean Water] Act should be read *in pari materia*"). And while the D.C. Circuit considered it unnecessary to draw any inference from the fact that Congress excluded particular language in one section of a statute that it included in other sections of the same statute, this Court has long held just the opposite. *See, e.g.*, *KP Permanent Make-Up, Inc.* v. *Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ") (quoting & citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). This Court requires courts to pay attention to statutory structure. The court of appeals disregarded that important constraint on an agency's interpretative choices.

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The D.C. Circuit's novel approach to *Chevron* has introduced new and troubling uncertainty into the traditional understanding of a statutory term of art used in many federal statutes. Given the sheer number of agency interpretations the D.C. Circuit reviews each year, its newly minted rule of decision is also sure to do yet more harm if it takes hold. The Court should grant certiorari to clarify that it is Congress—not the Executive Branch—whose intent alone matters at *Chevron* step one. S. Ct. Rule 10(c).

## II. BY REJECTING *RIVERSIDE BAYVIEW HOMES'* CONSTITUTIONAL AVOIDANCE RULE, THE RULING BELOW TRIGGERS A CIRCUIT SPLIT AND INJECTS FURTHER UNCERTAINTY INTO THE RULE'S PROPER APPLICATION.

The decision below also injects needless confusion into another settled rule: that agency interpretations that threaten takings should be judicially narrowed to avoid constitutional difficulties.

It has long been the rule that courts do not owe the customary *Chevron* deference to an agency's statutory interpretation that raises serious constitutional difficulties. *See Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-576 (1988) (citing *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 499-501 (1979)); *Rust* v. *Sullivan*, 500 U.S. 173, 190-191 (1991). As this Court has explained, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *Edward J. DeBartolo Corp.*, 485 U.S. at 575; *see id.* (rejecting agency interpretation that "pose[d] serious questions of the validity [of the statute] under the First Amendment").

This principle of constitutional avoidance is particularly appropriate when an agency's interpretation threatens to take private property. Thus, in *Riverside Bayview Homes*, this Court explained that a statute should be given a narrowing construction where "it appears that there is an

identifiable class of cases in which application of [the] statute will necessarily constitute a taking." 474 U.S. at 129 n.5. The Court drew this rule from one of its earlier cases—*United States* v. *Security Industrial Bank*, 459 U.S. 70 (1982)—where it avoided "a substantial argument" that the retroactive application of a Bankruptcy Code provision would cause takings by "construing the statute to apply only prospectively." 474 U.S. at 129 n.5. As the Court explained there, this limiting approach is a "sensible" one to follow in cases that present substantial takings arguments. *See id.* But the Court nevertheless declined to follow that approach in the case before it because it determined that "there is no identifiable set of instances in which mere application of the [challenged] permit requirement will necessarily or even probably constitute a taking." *Id.*

### A. The Lower Courts Are Confused About How To Apply *Riverside Bayview Homes*' Constitutional Avoidance Rule.

In the years since the Court announced the constitutional-avoidance rule for takings cases, the lower courts have struggled to understand and apply it. Four courts of appeals have addressed the *Riverside Bayview Homes* takings rule—the Fifth Circuit, the Eighth Circuit, the Federal Circuit and the D.C. Circuit—and each has adopted differing views of it.

**The Fifth Circuit.** In *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393 (5th Cir. 1999), petitioners alleged that the timetable adopted by the Federal Communications Commission for implementing its support system to ensure universal

telephone service worked a taking and that "the FCC should adopt a narrow construction of the statutory language to avoid any constitutional infirmities." *Id.* at 437. While the Fifth Circuit recognized that *Riverside Bayview Homes* requires narrowing constructions in some circumstances, it ultimately declined to adopt such a construction based on the likely practical effect of the regulation: "[e]ven if" the petitioners could show "that some taking will result," the court of appeals concluded, petitioners could not demonstrate "that the[ir] losses are so significant that the 'net effect' is confiscatory." *Id.* The court's holding thus seems to have rested on the conclusion that the FCC's timetable worked no taking. *See id.* No similar conclusion, of course, can be reached here.

**The Eighth Circuit.** In *Iowa Utilities Bd.* v. *FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd in part on other grounds sub nom. Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467 (2002), petitioners argued that the forward-looking pricing methodology for interconnection and unbundled telecommunications network elements the FCC adopted under the Telecommunications Act of 1996—known as TELRIC—"raise[d] a serious Fifth Amendment takings issue that the statute should be construed to avoid." *Id.* at 753. Applying *Riverside Bayview Homes*, however, the court of appeals concluded that "[w]e do not need to disregard *Chevron* deference and interpret the statute * * * to avoid an unconstitutional taking in this instance" because "[t]he possibility that a regulatory program may result in a taking does not justify the use of a narrowing construction." *Id.* at 754. The operative

word there was "may"; TELRIC's impact could not be known until it was actually implemented, and there accordingly could be no class of takings claims until the methodology was used to set actual rates. *See Iowa Utils. Bd.*, 219 F.3d at 754. No such uncertainty, of course, exists here.

**The Federal Circuit.** In *Florida Rock Indus., Inc.* v. *United States*, 791 F.2d 893 (Fed. Cir. 1986), Florida Rock, "a large-scale miner of limestone," alleged that a large tract of land containing limestone deposits was taken when the Army engineers denied it a Clean Water Act permit to discharge dredged materials into wetlands. *Id.* at 895. Reviewing the claims court's award of damages to Florida Rock, the Federal Circuit, relying upon *Riverside Bayview Homes*, explained that, even if a constitutional violation "occurred here in the form of a taking without just compensation," "a more cautious construction of the Clean Water Act is not legally required." *Id.* at 900. The reason was the clear availability of compensation for this particular taking under the Tucker Act. *See id.* (explaining if a taking "occurred here * * * it is cured by the Tucker Act").

**The D.C. Circuit.** In contrast with these Circuits, which have accepted the *Riverside Bayview Homes* canon but found it inapplicable in the particular factual contexts in which it has been invoked, the D.C. Circuit has applied the rule on multiple occasions and even enforced it. *See Building Owners & Managers Ass'n Int'l* v. *FCC*, 254 F.3d 89, 99-100 (D.C. Cir. 2001); *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667, 690 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC*, 535 U.S. 1 (2002);

*National Mining Ass'n* v. *Babbitt*, 172 F.3d 906, 917 (D.C. Cir. 1999); *Bell Atl. Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445-47 (D.C. Cir. 1994); *Railway Labor Executives' Ass'n* v. *United States*, 987 F.2d 806, 816 (D.C. Cir. 1993); *see also GTE Serv. Corp.* v. *FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000) (recognizing "a broader construction of 'necessary' under § 251(c)(6) might result in an *unnecessary* taking of private property") (emphasis in original).[22]

The D.C. Circuit gave the fullest exposition of the *Riverside Bayview Homes* rule in *Bell Atlantic*, a case in which local exchange carriers challenged the FCC's authority to require them to permit competitive carriers to physically co-locate facilities within their central offices. The *Bell Atlantic* court explained that the constitutional-avoidance rule derived from the Constitution's structural separation of powers: "Where administrative interpretation of a statute creates" an identifiable class of takings claims, the "use of a narrowing construction prevents executive encroachment on Congress's exclusive powers to raise revenue." 24 F.3d at 1445. Otherwise, executive-branch agencies could "use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen." *Id.* Bearing these concerns in mind, the *Bell Atlantic* court went on to impose a narrowing construction on the regulation in question there: The FCC could not

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[22] Given the heavy volume of agency statutory interpretations the D.C. Circuit is called on to review, it is unsurprising that that court has amassed the most experience with the *Riverside Bayview Homes* rule. By the same token, the D.C. Circuit's sudden rejection of the rule is likely to have the greatest impact on future agency interpretations.

impose a physical co-location requirement because it "create[d] an 'identifiable class' of applications that would seem to constitute a taking." *Id.* at 1446.

### B. The Ruling Below Exacerbates The Confusion In The Lower Courts By Causing A Circuit Split.

In a sharp—but unexplained—break with its own precedent, as well as with that of the other Circuits that have recognized the validity of the *Riverside Bayview Homes* rule (if not how or when to apply it), the court below effectively rendered this strain of the constitutional-avoidance canon a dead letter. Recall that OSM itself acknowledged that its regulation carried "significant takings implications" and even went so far as to point out that its VER standard would prevent mining initially in thousands more acres subject to valid mining rights than would otherwise be allowed under a different standard. *See* 64 Fed. Reg. at 70,776, 70,778. Yet the D.C. Circuit nonetheless concluded that *Riverside Bayview Homes* did not come into play because NMA failed to present sufficient "evidence" that OSM's regulation created an "identifiable class" of takings claims. App. 16a. The D.C. Circuit's assertion that no "evidence suggest[ed]" that compensable takings will follow on OSM's regulation is strange indeed, given that OSM acknowledged throughout its preamble the "significant" takings implications of its own regulation. *See* 64 Fed. Reg. at 70,777, 70,781, 70,824, 70,827. And there simply can be no doubt that OSM's "good faith/all permits" plus-factor creates an identifiable class of takings cases; OSM said so. Nor does it take much to discern the class. The "identifiable class" consists of miners with valid

property rights to surface mine coal estates in a protected area who did not secure (or make a good faith effort to secure) all permits or authorizations before the area came under SMCRA's protections. *See* 30 C.F.R. § 761.5; 64 Fed. Reg. at 70,824. And the number of acres impacted by OSM's statutorily impermissible plus-factor will only increase as additional areas come within Section 522(e)'s protections. *See supra* at 12. *Riverside Bayview Homes* requires nothing more; the narrowing construction there was occasioned by "a substantial argument"—not evidence.

Even more troubling than the D.C. Circuit's blithe disregard of the obvious class of takings claims sparked by OSM's regulation is its disregard of earlier cases recognizing that Section 522(e)'s VER clause is intended to *prevent* takings—not facilitate them. *See Hodel*, 452 U.S. at 297 n.37 (explaining that takings challenge was "premature" because "522(e)'s restrictions are expressly made subject to 'valid existing rights' "); *National Wildlife Fed'n*, 839 F.2d at 749-750 ("Congress * * * limited the application of the surface mining proscriptions to avoid infringement of existing property rights" and "did not intend to * * * effect takings through § 522(e)"). If ever there were occasion to adopt a narrowing construction of an agency regulation to avoid the takings difficulties caused by an agency's chosen interpretation, it must be where (as here) the agency selected a discretionary interpretation it admitted carried the "greatest potential to result in compensable takings," 64 Fed. Reg. at 70,781-82, and where (as here) courts have previously recognized that Congress sought to avoid that very result in

protecting "valid existing rights" in the first place. If the *Riverside Bayview Homes* rule does not have any force in that circumstance, there is no such rule.

* * *

The decision below thus exacerbates the confusion in the lower courts (including even within the D.C. Circuit itself) concerning the proper interpretation and application of the *Riverside Bayview Homes* rule of constitutional avoidance. This Court should take this opportunity to provide guidance to the lower courts by clarifying when—if ever—statutes that threaten takings should receive narrowing interpretive constructions. S. Ct. Rule 10(a).

## III. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS A QUESTION OF SIGNIFICANT NATIONAL IMPORTANCE.

SMCRA is one of more than 100 federal statutes and proclamations that protect "valid existing rights." *See supra* at 6-7; App. E. These provisions collectively affect a diverse group of property owners dependent upon natural resources, including—but by no means limited to—the coal mining industry. *See supra* at 7-8. And these provisions have traditionally been understood to protect pre-existing property rights from destruction by subsequently enacted federal laws. *See supra* at 7-8.

The ruling below directly challenges that conventional understanding by holding that Section 522(e)'s VER clause protects "equitable interests in regulatory approval[s]," not property interests. *See supra* at 8. That move, made possible only through a novel interpretative mode out of step with this

Court's instructions, carries serious consequences. It casts grave doubt on the proper interpretation of a familiar term of art that Congress has used in numerous statutes scattered throughout the United States Code. *See* App. E. It unsettles what had been settled past interpretations of VER clauses. And its interpretation is sure to inform future agency and judicial interpretations of other VER clauses in other federal statutes and proclamations. The D.C. Circuit's VER ruling thus has far-reaching implications for all industries that invest in property rights to extract valuable resources from the land.

This Court in the past has recognized the substantial national significance of SMCRA's regime—and of the takings consequences that potentially attend it. When this Court considered a pre-enforcement challenge to SMCRA's constitutionality in 1981, it found a takings challenge to Section 522(e) "premature" in part because the statute's "restrictions are expressly made subject to 'valid existing rights.'" *Hodel*, 452 U.S. at 296 n.37. The Court also at that time rejected the appellees' contention, based on a 1980 regulation that the district court had remanded to the Secretary for reconsideration, that Section 522(e)'s VER clause "applies only to specific surface mining operations for which all required permits were issued prior to August 3, 1977, the effective date of the Act," explaining that "[t]his interpretation of the exception is not compelled by either the statutory language or its legislative history." *Id.* Now that the Secretary, after wavering for nearly a quarter of a century, has indeed interpreted Section 522(e)'s "valid existing rights" clause to contain a

"good faith/all permits" plus-factor, the propriety of that interpretation is squarely presented to this Court.

This Court should take the opportunity now to review OSM's interpretation, because the chance may not come again. The D.C. Circuit is the exclusive venue in which national rules and regulations promulgated by the Secretary—such as the one at issue here—may be challenged. *See* 30 U.S.C. § 1276(a)(1) ("Any action by the Secretary promulgating national rules or regulations * * * shall be subject to judicial review in the United States District Court for the District of Columbia Circuit."). And because national regulations must be challenged within 60 days, the legality of the Secretary's VER rule cannot be contested later as applied in a particular case. *See id.* ("A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action * * * ."); *see also Commonwealth of Va. ex rel. Va. Dep't of Conservation & Econ. Dev.* v. *Watt*, 741 F.2d 37, 41 (4th Cir. 1984) (rejecting as "clearly subvert[ing] Congressional intent" the view that "those opposed to a national regulation could simply ignore the sixty-day statutory time limit prescribed for bringing an action in the District of Columbia and obtain relief later in their local jurisdiction"). A split in lower court authority therefore is unlikely to emerge. And there accordingly is nothing to be gained by allowing the issue to further percolate in the lower courts.

There are no impediments, procedural or otherwise, that would complicate this Court's

consideration of the proper construction of Section 522(e)'s VER clause. NMA squarely challenged OSM's interpretation of Section 522(e)'s VER clause below in the agency, at the District Court, and in the D.C. Circuit, and the court of appeals resolved NMA's challenge on the merits.

This Court should act to provide the lower courts with needed guidance on the correct meaning of this important statutory term.

## CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# APPENDIX A
# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued September 24, 2007

Decided January 15, 2008

No. 06-5199

NATIONAL MINING ASSOCIATION,
APPELLANT

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.,
APPELLEES

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Appeal from the United States District Court
for the District of Columbia
(No. 00cv00283)

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*Kirsten L. Nathanson* argued the cause for appellant. With her on the briefs were *Harold P. Quinn, Jr.* and *Thomas C. Means*. *Joseph M. Klise* entered an appearance.

*Blair M. Gardner* was on the brief for amicus curiae National Council of Coal Lessors, Inc. in support of appellant.

*Kathryn E. Kovacs*, Attorney, U.S. Department of Justice, argued the cause for federal appellees. With

her on the brief was *Robert Oakley*, Attorney.

*Walton D. Morris, Jr.* was on the brief for appellee Kentucky Resources Council, Inc.

Before: GARLAND and GRIFFITH, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

GRIFFITH, *Circuit Judge*

The Secretary of the Interior has interpreted the phrase "valid existing rights" in the Surface Mining Control and Reclamation Act to foreclose surface mining operations in sensitive areas. The National Mining Association challenges this reading of the statute, but we conclude that we must defer to the Secretary's reasonable interpretation of this ambiguous phrase.

## I.

In 1977, Congress enacted the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201 *et seq.*, "to protect society and the environment from the adverse effects of surface coal mining operations," *id.* § 1202(a). Section 522(b) of the SMCRA authorizes the Secretary of the Interior ("Secretary") to prohibit surface coal mining operations on federal lands if he determines them to be unsuitable for that purpose. *Id.* § 1272(b). Section 522(e) bans outright surface mining in statutorily designated areas.[1] *Id.* § 1272(e). In this appeal, we

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[1] Subject to certain exceptions, § 522(e) designates the following areas: lands within the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System; federal lands within a national

are asked to determine how Congress intended that ban to work. The relevant text of § 522(e) provides: "After August 3, 1977, and subject to *valid existing rights* no surface coal mining operations except those which exist on August 3, 1977, shall be permitted [in the statutorily designated areas]." *Id.* (emphasis added).

Because one must show "valid existing rights" ("VER") to start a surface mining operation in a § 522(e) area, the meaning of the phrase is critical. For decades, the Secretary and the courts have wrestled with how best to understand VER and determine what it protects. We need not recount this history. Suffice it to say that VER has occasioned a spectrum of agency interpretations, ranging from a relaxed "ownership and authority" standard, which required only that the miner show a property right in the coal, to a more exacting "all permits" standard, which called for a showing that surface mining licenses had been issued prior to the date § 522(e) took effect. *See* Valid Existing Rights, 64 Fed. Reg. 70,766, 70,769–71 (Dec. 17, 1999) (recounting Secretary's prior definitions of VER).

In 1999, the Secretary and the Office of Surface Mining Reclamation and Enforcement promulgated a rule through notice-and-comment procedures offering yet another interpretation of VER. *Id.* at 70,831–32 (codified at 30 C.F.R. § 761.5). This "1999 Rule," as we will call it, was a setback for parties hoping to conduct new surface mining operations in § 522(e) areas. Under the 1999 Rule, a miner claiming VER

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forest; areas that would adversely affect public parks or places included in the National Register of Historic Sites; areas within one hundred feet of the outside right-of-way line of any public road; and areas within three hundred feet of any occupied dwelling, public building, school, church, community, or institutional building, or within one hundred feet of a cemetery. *See* 30 U.S.C. § 1272(e).

protection must satisfy two conditions. First, he must produce a legally binding document that vested him with the right to mine the land at the time it came under § 522(e). Second, he must either prove that the owner of the land, by the time it came under § 522(e), had made a good faith effort to obtain all necessary permits for the mining, or else prove that the coal is immediately adjacent to a surface mining operation in existence on August 3, 1977 and is needed to ensure the economic viability of the mining operation as a whole. The Secretary prefaced this interpretation of VER with a 72-page preamble describing the agency's long relationship with the phrase, explaining the rationale for the latest interpretation, and responding to objections raised during the notice-and-comment period. Significantly, the preamble acknowledges that the chosen VER interpretation protects 3,062 more acres than the least restrictive alternative and predicts that "few persons will qualify for VER under this standard." Valid Existing Rights, 64 Fed. Reg. 70,766, 70,776, 70,778 (Dec. 17, 1999).

The National Mining Association ("NMA"), an industry trade association with standing to bring suit on behalf of its members under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), challenged the 1999 Rule pursuant to 30 U.S.C. § 1276(a)(1) in the United States District Court for the District of Columbia. The NMA argued that the 1999 Rule's interpretation of VER was too narrow and shielded more land from surface mining than Congress intended. On cross-motions for summary judgment, the district court found the statute ambiguous, deferred to the Secretary's interpretation as reasonable, and entered judgment for the Secretary. *Nat'l Mining Ass'n v. Scarlett*, 2006 WL 1194224, *6–9 (D.D.C. May 4, 2006) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The NMA

appeals. For the reasons set forth below, we affirm the district court's judgment.

## II.

This case begins with an unusual question created by a mistake in the language of the jurisdictional grant. We have an "independent obligation to determine whether subject-matter jurisdiction exists," *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006), which we must discharge before ruling on the merits, *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998)).

The district court claimed jurisdiction under 30 U.S.C. § 1276(a)(1), which renders "[a]ny action by the Secretary promulgating national rules or regulations . . . subject to judicial review in the United States District Court for the District of Columbia Circuit." But there is no such court within the federal judiciary. The judgment the NMA has asked us to review comes from a court called "the United States District Court for the District of Columbia." *See* Act of June 25, 1948, ch. 646, 62 Stat. 869, 875, 895 (codified at 28 U.S.C. §§ 88, 132(a)); *see also In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 516 n.2 (D.C. Cir. 1981) (noting § 1276(a)(1)'s error); *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1350 n.1 (D.C. Cir. 1980) (same). Because the inferior federal courts are "creatures of statute," *Bath County v. Amy*, 80 U.S. (13 Wall.) 244, 247–48 (1871), we must pay careful attention to the legislative texts by which we are given authority. The district court did not address the mistake in the statute, so the task falls to us.

"[C]ourts will not give independent meaning to a word where it is apparent from the context of the act that the word is surplusage," *Am. Radio Relay*

*League, Inc. v. FCC*, 617 F.2d 875, 879 (D.C. Cir. 1980) (citation and quotation marks omitted), so we will excise the word "Circuit" from the text of § 1276(a)(1). We have no qualms about this erasure, for both Congress's intent and the error impeding it are plain to see. *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.37 (6th ed. 2002) ("A majority of the cases permit the elimination or disregarding of words in a statute in order to carry out the legislative intent or meaning."); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1375 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("Courts on occasion can correct mistakes . . . when it is completely clear from the context that a mistake has been made."). In § 1276(a), Congress subjected the Secretary's behavior to judicial review in various district courts. It would be absurd to assume that Congress intended to shield the Secretary's national rules against judicial review by granting jurisdiction to a nonexistent court. *Cf. Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly and courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power within statutory limits . . . ."). We read § 1276(a)(1) as granting jurisdiction to the United States District Court for the District of Columbia in the present case, notwithstanding Congress's erroneous inclusion of the word "Circuit." Our jurisdiction to review the final decision of that court comes from 28 U.S.C. § 1291.

## III.

We review de novo the district court's grant of summary judgment. *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 756 (D.C. Cir. 2003). Because Congress has charged the Secretary with implementing the

SMCRA, we review the agency's interpretation of the statutory phrase "valid existing rights" under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Citizens Coal Council v. Norton*, 330 F.3d 478, 481 (D.C. Cir. 2003) (applying *Chevron* to Secretary's interpretation of the SMCRA). Where the statute is ambiguous, we defer to the agency's reasonable interpretation of its meaning. By contrast, a clear expression of congressional intent will bind agency and court alike. *Chevron*, 467 U.S. at 842–43.

The NMA urges that Congress inserted VER in § 522(e) to protect mineral owners' property rights. As the NMA tells it, VER allows surface mining by those with a property right to mine coal. Were this true, the Secretary's restrictive interpretation of VER in the 1999 Rule would violate a congressional directive, and we would be required to set it aside. But we do not read the statute so narrowly. Since 1977, VER has been interpreted by five different Administrations, each of which has found within its borders the room to establish a preferred policy. The NMA takes this history to mean that the agency's current policy is entitled to less deference because it has changed over time, but the opposite is true. That Congress presented so wide a range of plausible interpretations to an agency with rulemaking authority shows a delegation to the executive branch of the power to make reasonable adjustments to the nation's surface mining policy.

**A.**

Our *Chevron* analysis begins with asking whether Congress has delegated authority to an agency by leaving a statutory gap for the agency to fill. 467 U.S. at 843–44 (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Our reading of the SMCRA's language convinces us that VER is an ambiguous

phrase.[2] We have in the past determined that the phrase is subject to multiple and divergent interpretations. *See Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 748–51 (D.C. Cir. 1988) (noting the ambiguity inherent in VER and deferring to the Secretary's reasonable interpretation of the phrase as encompassing so-called "continually-created valid existing rights").

The major source of VER's ambiguity is the word "rights." The NMA, reaching for its dictionary, notes that the word "right" could be taken to mean "property right." *See* Appellant's Br. at 34 (interpreting "rights" to mean " 'an interest or title in an object of property' ") (quoting BLACK'S LAW DICTIONARY 1324 (6th ed. 1990)); *see also* BLACK'S LAW DICTIONARY 1347 (8th ed. 2004) (defining "right" as, *inter alia*, an "interest, claim, or ownership that one has in tangible or intangible property"). But according to the same dictionary on which the NMA relies, this is not the only meaning the word will bear. BLACK'S LAW DICTIONARY 1324 (6th ed. 1990) (defining "right" as, *inter alia*, "[a] legally enforceable claim of one person against another, that the other shall do a given act, or shall not do a given act"); *see also* BLACK'S LAW DICTIONARY 1347 (8th ed. 2004) (defining "right" as, *inter alia*, "[a] legally enforceable claim that another will do or will not do a given act"). In fact, this definition cuts against the NMA's proposed interpretation of VER because it is not tied in all circumstances to property.

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[2] We have noted that the legislative history of the SMCRA does not illuminate the meaning of VER. *See Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 749 (D.C. Cir. 1988); *cf. Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 283 (1996) (Scalia, J., concurring) ("The text's the thing. We should therefore ignore drafting history without discussing it, instead of after discussing it.").

Just as "right" can function as a proxy for property rights, it will also do service more generally. *See, e.g.*, *id.* ("[s]omething that is due to a person by just claim, legal guarantee, or moral principle"); 13 THE OXFORD ENGLISH DICTIONARY 923 (2d ed. 1989) ("[j]ustifiable claim, on moral or legal grounds, to have or obtain something, or to act in a certain way"); WEBSTER'S NEW INTERNATIONAL DICTIONARY 2147 (2d ed. 1952) ("[t]hat to which one has a just claim"). Under *Chevron*, we ask "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. By using a word with multiple and often vague meanings, it is hard for us to conclude that Congress has done that here. The word "right," instead of answering a question, unhelpfully asks another one: To what is a person legally entitled? Similarly, "valid" could mean "[l]egally sufficient," BLACK'S LAW DICTIONARY 1586 (8th ed. 2004), which is equally unhelpful because it requires yet another question: Under law, what makes a miner's rights sufficient? The dictionary counsels in favor of more deference to the agency, not less. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005) ("[W]here a statute's plain terms admit of two or more reasonable ordinary usages, the [agency's] choice of one of them is entitled to deference."); *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992) ("The existence of alternative dictionary definitions of the word 'required,' each making some sense under the statute, itself indicates that the statute is open to interpretation.") (citation omitted); *AFL-CIO v. FEC*, 333 F.3d 168, 174 (D.C. Cir. 2003) ("[T]he fact that the provision can support two plausible interpretations renders it ambiguous for purposes of *Chevron* analysis.") (citation omitted).

VER could be read, as the NMA suggests, as protecting "valid existing *property* rights." But it could also encompass a narrower protection, as in

the 1999 Rule. Nothing in § 522(e) suggests Congress intended to enact the former understanding over the latter. This case is thus the reverse of *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140 (D.C. Cir. 2006). In *Friends of the Earth*, we found that Congress's use of the word "daily" to modify the phrase "total maximum loads" removed any ambiguity that otherwise existed. *See* 446 F.3d at 144 ("[B]y providing for the establishment of 'total maximum loads,' Congress could have left a gap for EPA to fill. Instead, Congress specified 'total maximum *daily* loads.' "). In § 522(e), by contrast, Congress enacted the ambiguous "valid existing rights" instead of the more precise "valid existing property rights." If VER operates as a "term of art," as the NMA suggests, it is as a tool by which Congress delegates policymaking authority through ambiguity.[3] *See, e.g.*, *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1345 (9th Cir. 1990) (noting the Secretary's interpretation of VER in 43 U.S.C. §§ 1701–1782); *Alekganik Natives Ltd. v. United States*, 806 F.2d 924, 926 (9th Cir. 1986) (noting the Secretary's interpretation of VER in 43 U.S.C. § 1610(a)(1)); *United States v.*

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[3] Academic commentary supports our reading of VER. We note that the *Journal of Mineral Law & Policy*, a publication of the University of Kentucky College of Law, dedicated an entire issue to analysis of VER as used in the SMCRA. *See generally Valid Existing Rights Symposium*, 5 J. MIN. L. & POL'Y 381 *et seq.* (1990). Despite devoting 375 pages to the topic, the symposium participants reached no consensus on VER's meaning. As stated by Professor Laitos, in whom the NMA's briefing places great faith: "Typically, Congress never lists what interests it means to include within the 'valid existing rights' phrase. The task of interpretation thus falls on the executive branch (*i.e.*, the Department of Interior) or the courts." Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 19 (1987). Of course, we cannot outsource the task of statutory interpretation to the professoriate, but we find it illuminating that scholars with expertise in this area have been similarly unable to distill a single, clear meaning from VER.

*Garfield County*, 122 F. Supp. 2d 1201, 1235–36 (D. Utah 2000) (noting Park Service's interpretation of VER in 16 U.S.C. § 273(a)); *cf.* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545 (1947) (noting "a recent cartoon in which a senator tells his colleagues 'I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means.' ").

Of course, not every statutory ambiguity gives rise to agency prerogative. *See Gonzales v. Oregon*, 546 U.S. 243, 258 (2006); *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998). But where Congress has indicated that it "would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), its decision to leave "a gap for an agency to fill . . . is a delegation of authority to the agency to give meaning to a specific provision of the statute by regulation," *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001). So it is in this case. *See* 30 U.S.C. § 1211(c)(2) (empowering the Secretary to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of [the SMCRA]"); *Mead*, 533 U.S. at 229 ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."). It remains for us to determine whether the Secretary served as Congress's faithful agent in giving meaning to VER's ambiguities.

**B.**

Having satisfied ourselves that VER is ambiguous, we defer to the Secretary's interpretation of the phrase if it "is based on a permissible

construction of the statute." *Chevron*, 467 U.S. at 843. All we ask of the agency is a reasonable interpretation. *See Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240 (D.C. Cir. 2007); *Citizens Coal Council v. Norton*, 330 F.3d 478, 483 (D.C. Cir. 2003). By "consider[ing] the matter in a detailed and reasoned fashion" and demonstrating in its 72-page preamble that "the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense," we conclude that the Secretary has adopted a reasonable interpretation of the statute. *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1206 (D.C. Cir. 1996).[4]

The 1999 Rule remains true to the authority delegated to the Secretary in the SMCRA by protecting against the harmful effects of surface mining that Congress sought to ameliorate. Providing this protection is the primary aim of the statute. *See* 30 U.S.C. § 1201(e) (declaring that regulation of surface coal mining "is an appropriate and necessary means to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations"); *id.* § 1201(c), (k) (warning of deleterious effects of surface coal mining); *id.* § 1202(a) (stating that a purpose of the SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations"); *id.* § 1202(f) (stating that a purpose of the SMCRA is to "strike a balance between

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[4] Given the overlap between step-two *Chevron* review and the arbitrary-and-capricious review called for by § 1276(a)(1) and the APA, *see Shays v. FEC*, 414 F.3d 76, 96–97 (D.C. Cir. 2005) (collecting cases), the contention that the 1999 Rule violates § 1276(a)(1) fails for similar reasons. In the preamble to the 1999 Rule, the Secretary "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

protection of the environment . . . and the Nation's need for coal as an essential source of energy"). Therefore it is not surprising that the Secretary has promulgated an interpretive rule that cuts against the interests of some miners.

The NMA's suggestion that the SMCRA effected robust protection of miners' property rights is belied by the way Congress used the word "property" in that statute. Of the twenty-nine instances in which "property" appears, only one refers to protecting the property rights of subsurface owners of the mineral estate. *Id.* § 1304(g) (concerning coal owned by the United States). Many uses of "property" concern the protection of surface or adjacent property owners *against* the harmful effects of surface mining, *id.* §§ 1201(c), 1233(a)(1)(A), 1239(a), 1253(a)(15)(C), 1253(a)(17), 1257(f), 1269(a), 1270(f), 1272(a)(3)(D), 1307(b), and several mentions of "property" run counter to miners' property rights, in that they authorize government entry onto mined property to assess and remedy environmental degradation caused by strip mining, *id.* §§ 1237(a), 1237(b), 1240(b).

Save for repeating its argument that VER is unambiguous and accusing the Secretary of "flip-flopping," Appellant's Br. at 53, the NMA provides little resistance on this front.[5] With the exception of the constitutional avoidance argument, discussed next, the NMA offers no basis for finding the Secretary's interpretation unreasonable. If that argument fails, we must accord *Chevron* deference to the 1999 Rule. *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003) ("Here, however,

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[5] The NMA's "flip-flopping" point ignores the agency's obligation to "consider varying interpretations and the wisdom of its policy on a continuing basis," *Chevron*, 467 U.S. at 863–64.

[petitioner] advances no additional argument beyond those already discussed as part of step one, and so we have no basis for finding the Commission's interpretation unreasonable. In any event, the language of [the statute] plainly admits of the Commission's interpretation, and it therefore is a permissible construction of the statute.").

The NMA asserts that the 1999 Rule runs afoul of both the Due Process and Takings Clauses of the Fifth Amendment, an argument raised to invoke the canon of constitutional avoidance. Because the judiciary must rightly presume that Congress acts consistent with its duty to uphold the Constitution, courts make every effort to construe statutes so as to find their constitutional foundations and thus avoid needless constitutional confrontations. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). This canon of constitutional avoidance trumps *Chevron* deference, *see DeBartolo*, 485 U.S. at 574–77, and we will not submit to an agency's interpretation of a statute if it "presents serious constitutional difficulties," *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995). But we do not abandon *Chevron* deference at the mere mention of a possible constitutional problem; the argument must be serious. *See Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 409 (D.C. Cir. 1996). The NMA's arguments are not.

Though its briefs are unclear, the NMA appears to argue that its procedural due process rights were violated because the 1999 Rule created no mechanism by which miners could comply with the good-faith permitting requirement had they not already done so by August 3, 1977. The NMA argues that *United States v. Locke*, 471 U.S. 84, 108 (1985),

and *Texaco, Inc. v. Short*, 454 U.S. 516, 531–32 (1982), require such a mechanism. But those cases dealt with a different type of legislative determination than we have here. In both *Locke* and *Texaco*, a legislature addressed a dispute over dormant mines by creating a process that would allow miners to protect their claims. The issue in those cases was whether claimants had been improperly denied their rights to make their claims. In § 522(e), Congress chose a different means to address a problem: It prohibited new surface mining in sensitive areas for all but those who could show a valid existing right to mine the land. Congress created no process by which to abide, no regulatory regime with which to comply. It simply declared surface mining off limits for those who had no valid existing rights. Congress created no process that the NMA can successfully argue it was denied.

The NMA also argues that the 1999 Rule precludes *Chevron* deference by working a taking of subsurface coal interests. A taking, however, is only unconstitutional if the government fails to pay just compensation, and the Tucker Act provides for such a remedy. *See* 28 U.S.C. § 1491(a). Miners can pursue their takings claims in the Federal Claims Court. Given this protection, the NMA's takings challenge raises no serious question about the 1999 Rule that would preclude *Chevron* deference. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 127–28 (1985); *Ry. Labor Executives' Ass'n v. United States*, 987 F.2d 806, 816 (D.C. Cir. 1993) (per curiam).

This is not to say that the canon of constitutional avoidance can be ignored with respect to every argument sounding in the Takings Clause. The Supreme Court has recognized that the Claims Court is not a proper venue if a statute creates "an identifiable class of cases in which application of

[the] statute will necessarily constitute a taking." *Riverside Bayview*, 474 U.S. at 128 n.5 (construing *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982)). Likewise, we have refused *Chevron* deference to an agency interpretation that created an "identifiable class" of takings victims. *See Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (noting that "*Chevron* deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen," which would impinge Article I authority). But the NMA has shown no "identifiable class" of miners whose takings claims would expose the Treasury to such liability. At oral argument, the NMA did not claim that the government would be on the hook for a "massive and unforeseen" sum, paid out to frustrated miners as just compensation. *See* Oral Arg. Recording at 14:45–17:52. The record is devoid of evidence suggesting it is so. Given this implicit concession that the 1999 Rule will have relatively insignificant takings implications that can be readily addressed in the Court of Claims, there is no serious constitutional problem to be avoided. "[T]he avoidance canon is not applicable when the statute or regulation would effect a taking, if at all, only in certain situations." *Nat'l Mining Ass'n v. Babbitt*, 172 F.3d 906, 917 (D.C. Cir. 1999). The usual *Chevron* analysis is therefore applied to the 1999 Rule, which results in our deferring to the Secretary's reasonable interpretation of an ambiguous statutory term.

## IV.

The district court properly accorded *Chevron* deference to the Secretary's interpretative rule. The judgment is

*Affirmed.*

# APPENDIX B
# UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 00-283 (RWR)

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NATIONAL MINING ASSOCIATION,
*Plaintiff,*

v.

LYNN SCARLETT, *et al.*,

*Defendants.*

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## MEMORANDUM OPINION

Plaintiff National Mining Association ("NMA") challenges as arbitrary, capricious, or otherwise inconsistent with the law the 1999 final rule of the Office of Surface Mining Reclamation and Enforcement ("OSM") and the Secretary of the Interior ("Secretary")[1] interpreting "valid existing rights" under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"), 30 U.S.C. §§ 1201 et seq., which prohibits new surface coal mining operations on specified lands subject to

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[1] Lynn Scarlett, the current Acting Secretary of the Interior and Jeffrey Jarrett, the current Director of the Office of Surface Coal Mining and Reclamation, are substituted as defendants in lieu of former Secretary Bruce Babbit and former Director Kathleen Karpan. See Fed. R. Civ. P. 25(d)(1).

valid existing rights. NMA alleges that the final rule improperly limits the circumstances under which valid existing rights will be recognized, contrary to clear Congressional intent. NMA has moved for summary judgment, and the Secretary and OSM, and intervenor-defendants, have cross-moved for summary judgment. Because NMA has failed to show that the 1999 final rule is contrary to the clear intent of Congress, arbitrary, capricious, or otherwise inconsistent with the law, NMA's motion for summary judgment will be denied. Moreover, because the Secretary's interpretation of valid existing rights is a permissible construction of the statute and the agency reviewed all the relevant data in reaching its conclusion, defendants' and intervenor-defendants' motion for summary judgment will be granted.

## BACKGROUND

The SMCRA was passed in 1977 as "a comprehensive statute designed to 'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'" Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264, 268 (1981) ("VSMRA") (quoting 30 U.S.C. § 1202(a)). Congress sought to "strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f). Section 522(e) of the Act prohibits new surface coal mining operations on certain lands directly declared by Congress to be unsuitable for mining.[2] 30 U.S.C.

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[2] These lands include the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, federal lands within any national forest, publicly owned parks or historic sites that will be adversely affected by mining, areas within one hundred feet of public roads, areas within three hundred feet of occupied dwellings or

§ 1272(e)(1)-(5); see also Nat'l Wildlife Fed. v. Hodel, 839 F.2d 694, 749 (D.C. Cir. 1988). However, the prohibition of new mining operations on these lands is "subject to valid existing rights." Id. Congress failed to define or elaborate on the meaning of "valid existing rights" in the statutory language of the SMCRA or in its legislative history. See Nat'l Wildlife Fed. v. Hodel, 839 F.2d at 749. The meaning of valid existing rights in the SMCRA has been the subject of extensive litigation since the passage of the Act, and in 1999, OSM promulgated the latest iteration of regulations defining the phrase. See Valid Existing Rights, 64 Fed. Reg. 70766, 70766-838 (Dec. 17, 1999).

## I. REGULATORY HISTORY

### A. 1979 regulation

OSM first promulgated a final rule defining valid existing rights for SMCRA § 522(e) in 1979. This first final rule

> provided that, except for haul roads, [valid existing rights] included only those property rights in existence on August 3, 1977, the owners of which either had obtained all necessary permits for the proposed surface coal mining operation on or before August 3, 1977 (the 'all permits' standard), or could demonstrate that the coal for which the exception was sought was both needed for and immediately adjacent to a surface coal mining operation in existence on August 3, 1977 (the 'needed for and adjacent to' standard).

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public and community buildings, and areas within one hundred feet of a cemetery. See 30 U.S.C. § 1272(e)(1)-(5).

64 Fed. Reg. at 70769-70 (citing 44 Fed. Reg. 14902, 15342 (Mar. 13, 1979)). Several plaintiffs challenged the adoption of the "all permits" standard defining valid existing rights, arguing, among other things, that the standard was contrary to Congressional intent to preserve state law property rights, that it constituted an unconstitutional taking, and that it was arbitrary and capricious. See In re Permanent Surface Mining Regulation Litigation, 14 Env't Rep. Cas. (BNA) 1083, 1090-91 (D.D.C. Feb. 26, 1980) ("PSMRL I"). The district court remanded the regulation back to OSM explaining that the "all permits" standard must also include individuals who had not yet obtained all permits but had made a good-faith attempt to do so. Id. at 1091. The PSMRL I court did not reach the question of Congressional intent explaining that the Secretary had conceded that Congress intended valid existing rights "to encompass property rights recognized as valid under state case law." Id. at 1090. The court also declined to reach the takings challenge to the "all permits" standard because the plaintiffs' claim was "hypothetical" and did not present the court with sufficient facts to decide the issue. Id. at 1091. On appeal, because the government informed the court it was reconsidering the 1979 rule, the D.C. Circuit remanded the case to the district court. In so doing, the D.C. Circuit explained that the district court judgment should not be considered final and that the issues and arguments raised should be considered during the planned regulatory revision process. 64 Fed. Reg. at 70770 (citing In re Permanent Surface Mining Regulation Litigation, No. 80-1810, Order of Remand (D.C. Cir. Feb. 1, 1983). (See Pl.'s Stmt. of Material Facts ¶ 16.) In 1980, OSM suspended the 1979 final rule and announced that in the interim period the agency would interpret valid existing rights to include a property rights holder who had obtained all permits or had made a good faith effort

to obtain all permits. 64 Fed. Reg. at 70770. (See Pl.'s Stmt. of Material Facts ¶ 17.) This standard has come to be known as the "good faith/all permits" standard. Id.

B. 1983 Regulation And 1986 Suspension Notice

In 1983, OSM issued a final rule adopting a "takings" standard for valid existing rights. The rule provided that a valid existing right would exist

> for an area protected under section 522(e) of the Act on August 3, 1977, if the application of any of the prohibitions contained in that section to the property interest that existed on that date would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution.

(Pl.'s Stmt. of Material Facts ¶ 22) (quoting 30 C.F.R. § 761.5 (1983).) See 64 Fed. Reg. at 70770. In settling on this rule, OSM rejected all six rules, including a "good faith/all permits" standard, that it had proposed in 1982. 64 Fed. Reg. at 70770. (See Pl.'s Stmt. of Material Facts ¶ 20.) Several plaintiffs challenged the final rule arguing that the rule was so different from the various proposed rules that the agency was required to have an additional period for notice and comment. In re: Permanent Surface Mining Litigation, 22 Env't Rep. Cas. (BNA) 1557, 1558-59 (D.D.C. Mar. 1, 1985) ("PSMRL II"). The PSMRL II court agreed and remanded the rule to the agency. Id. at 1559, 1567. In a 1986 suspension notice, OSM rescinded the rule in order to comply with the court's order and reinstated the "good faith/all permits" standard. 64 Fed. Reg. at 70770. (See Pl.'s Stmt. of Material Facts ¶ 26.)

C. 1988 and 1991 Rulemaking and the Energy Policy Act of 1992

In 1988, OSM proposed, but later withdrew to allow further study, a rule defining valid existing rights as including the "good faith/all permits" standard and an "ownership and authority" standard under which valid existing rights could be established by demonstrating ownership of the coal and authority to mine it according to applicable state law. 64 Fed. Reg. 70770-71. (See Pl.'s Stmt. of Material Facts ¶ 27-34.) In 1990, OSM and the University of Kentucky College of Law cosponsored a symposium on the meaning of valid existing rights in § 522(e) of the SMCRA. 64 Fed. Reg. at 70771. See generally Symposium on Valid Existing Rights, 5 J. of Min. L. & Pol'y 381 (1990). "The participants [of the symposium] provided extensive analyses of takings jurisprudence and case law related to [valid existing rights], but they did not reach a consensus on how to determine [those rights]." 64 Fed. Reg. at 70771. Still seeking to comply with the court's order in PSMRL II, in 1991, OSM proposed to define valid existing rights as including the "takings" standard, the "good faith/all permits" standard, and the "needed for and adjacent to" standard. 64 Fed. Reg. at 70771. (See Pl.'s Stmt. of Material Facts ¶ 40.)

Before OSM promulgated a final rule, Congress enacted and the President signed the Energy Policy Act of 1992, directing the Secretary to interpret valid existing rights as set forth in the 1986 suspension notice that had adopted the "good faith/all permits" standard. See Pub. L. No. 102-486, 206 Stat. 2776 (1992). The Energy Policy Act of 1992 expired on October 23, 1993. However, the "good faith/all permits" standard continued as the regulatory standard for valid existing rights through October 1, 1995 because Congress placed moratoriums on publication of a new final rule on the

definition of valid existing rights. See, e.g., Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 103-332, 108 Stat. 2499 (1995); see also 64 Fed. Reg. at 70771.

D. 1999 regulation

In 1997, after evaluating the comments received on the 1991 proposed rule, OSM withdrew the rule and proposed a rule defining valid existing rights with the "good faith/all permits" standard. See Valid Existing Rights, 42 Fed. Reg. 4836 (Jan. 31, 1997). In December 1999, the agency promulgated a final rule by largely adopting its proposed rule. Under the rule, a person can establish valid existing rights by demonstrating a property right under applicable state law existing at the time the land came under protection of the SMCRA that vests the person with the right to conduct the intended type of surface coal mining intended, and (1) by having acquired or made a good-faith effort to acquire all necessary permits to conduct mining before the land came under protection of the act, or (2) demonstrating that the land is needed for and immediately adjacent to a surface coal mining operation. See 30 C.F.R. 761.5. The rule also recognizes valid existing rights for use or construction of roads on protected land under certain circumstances. Id.

II. THE RULEMAKING PROCESS FOR THE 1999 FINAL RULE

During the rulemaking process for the 1999 final rule, OSM considered several alternative definitions of valid existing rights, weighed the environmental impact of each alternative and considered the legislative history of SMCRA § 522(e), relevant litigation and case law, and comment letters before selecting the "good faith/all permits" and "needed for and adjacent to" standards.

A. Alternative regulatory standards

The alternative regulatory standards OSM considered included the "needed for and adjacent to" standard in combination with each of the following standards: (1) a "good faith/all permits" standard, (2) a "good faith/all permits or takings" standard under which valid existing rights could be established by a good faith effort to obtain all necessary permits or if applying the prohibitions of § 522(e) would result in an unconstitutional taking, (3) an "ownership and authority standard" under which a person claiming a valid existing rights exception would be required to demonstrate both a property right to the coal and the right to mine by the method intended, and (4) a "bifurcated" standard, under which either the "ownership and authority" standard or the "good faith/all permits" standard would apply depending on whether and when the mineral rights were severed from the estate. 64 Fed. Reg. at 70775. OSM concluded that the good faith/all permits and needed for and adjacent to standard[3] "best achieves protection of the lands listed in section 522(e) in a manner consistent with congressional intent at the time of SMCRA's enactment[,]" while simultaneously protecting "the interests of those persons who had taken concrete steps to obtain regulatory approval for surface coal mining operations on lands listed in section 522(e) before those lands came under the protection" of the SMCRA. Id. at 70776. OSM also determined that adoption of the "good faith/all permits" standard would cause the least disruption to the current State regulatory programs because "20 of the 24 approved State regulatory programs under

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[3] For brevity, this standard will be referred to as the "good faith/all permits" standard, but encompasses the recognition of valid existing rights in certain circumstances for use or construction of roads.

SMCRA already rely upon either the good faith/all permits standard or the all permits standard." Id.

B. Environmental and economic impact

OSM analyzed the environmental and economic impacts of each of these alternative regulatory standards and found that "compared with the other alternatives considered, the good faith/all permits standard is the most protective of the lands listed in section 522(e)." Id. In support of its finding, OSM cites an environmental impact statement that predicts that the adoption of the "takings" standard would result in the mining of 2,855 more acres of protected lands between 1995 and 2015 than if the "good faith/all permits" standard were adopted. Id. The impact statement predicted that the adoption of either the bifurcated standard or the "ownership and authority" standard would result in the mining of over 3,000 additional acres comparatively during the same time period. Id. OSM emphasized that the "additional disturbance would occur entirely on some of the lands for which the Senate Committee expressed the most concern." Id. In analyzing the economic impact of each proposed rule, OSM found only "negligible differences among the alternatives in terms of their economic impact." Id.

C. Consideration of legislative history

OSM also considered the legislative history of SMCRA § 522(e), but was unable to discern from Congress "clear or dispositive direction on the meaning or purpose of [valid existing rights.]" Id. OSM grants that "[t]here are credible supporting and opposing arguments for each alternative," but ultimately credits the Senate and House committee reports on the bills that eventually became the SMCRA to conclude that "Congress' purpose in enacting section 522(e) was to prevent new surface coal mining on the lands listed in that section." Id.

OSM specifically cites the following language from the Senate Committee on Energy and Natural Resources:

> [T]he Committee has made a judgment that certain lands simply should not be subject to new surface coal mining operations. These include primarily and most emphatically those lands which cannot be reclaimed under the standards of this Act and the following areas dedicated by the Congress in trust for the recreation and enjoyment of the American people: lands within the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the Wild and Scenic Rivers System, National Recreation Areas, National Forests with certain exceptions, and areas which would adversely affect parks or National Register of Historic [Places].
>
> In addition, for reasons of public health and safety, surface coal mining will not be allowed within one hundred feet of a public road (except to provide access for a haul road), within 300 feet of an occupied building or within 500 feet of an active underground mine.
>
> Since mining has traditionally been accorded primary consideration as a land use there have been instances in which the potential for other equally or more desirable land uses has been destroyed. The provisions discussed in this section were specifically designed and incorporated in the bill in order to

> restore more balance to Federal land use decisions regarding mining.

S. Rep. No. 95-128, at 55 (1977). OSM also cites the House Committee on Interior and Insular Affairs report, which reads in part:

> [T]he decision to bar surface mining in certain circumstances is better made by Congress itself. Thus section 522(e) provides that, subject to valid existing rights, no surface coal mining operation except those in existence on the date of enactment, shall be permitted on lands within the boundaries of units of certain Federal systems such as the national park system and national wildlife refuge system[ ], on Federal lands within the boundaries of any national forest (except in those circumstances set forth in Sec. 522(c) of the committee amendment) or in other special circumstances, that is within 100 feet of public roads, 300 feet of public buildings or churches, or 100 feet of a cemetery.

H.R. Rep. No. 95-218, at 95 (1977). OSM also explained that its definition for valid existing rights differs from the definition of the phrase in other federal statutes because unlike other statutes, the SMCRA applied to both Federal and non-Federal lands, concerns only a person's right to use land for a particular purpose and does not involve a transfer of property rights or interests from the Federal government to another party. 64 Fed. Reg. at 70793.

D. Review of relevant litigation

OSM also reviewed relevant litigation concerning valid existing rights and potential takings under the SMCRA. OSM addressed the

statement by the Supreme Court in VSMRA, 452 U.S. at 296 n.37, that an "all permits" standard for the valid existing rights exception "is not compelled by either the statutory language [of the SMCRA] or its legislative history." OSM reasoned that VSMRA did not reject the possibility of a "good faith/all permits" standard because the Court chose "decidedly neutral" language in stating simply that an "all permits" rule with no good-faith exception was not compelled by SMCRA and because "the definition of [valid existing rights] was not before the court" in that case. 64 Fed. Reg. at 70779. In addition, OSM explained its reliance on PSMRL I where the court held that "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test" that was promulgated in 1979. PSMRL I, 14 Env't Rep. Cas. (BNA) at 1091; see 64 Fed. Reg. at 70779. OSM also explained that PSMRL I held only that state law must be taken into account during the property rights demonstration prong of a permit-based standard requiring valid conveyance of a property right and receipt of all permits by the property right owner. See 64 Fed. Reg. at 70779. Further, OSM reviewed the Supreme Court's takings jurisprudence, and cases that have challenged the constitutionality of § 522(e) specifically. Id. at 70780-81. Based on that review, the agency concluded that "there is nothing in these court decisions, SMCRA, or its legislative history that precludes adoption of a good faith/all permits standard for [valid existing rights] under section 522(e) or suggests that adoption of this standard would be a facial regulatory taking." Id. at 70781.

E. Consideration of public comments

Finally, OSM heard testimony in the four public hearings it held on the proposed rule and considered approximately 75 comment letters

submitted by interested parties during the notice and comment period. Id. at 70767. The comments OSM considered expressed a wide range of concerns about the "good faith/all permits" definition of valid existing rights and were submitted by private citizens, companies and associations affiliated with mining, environmental groups, and federal, state, and local governmental entities. Id. at 70767.

NMA challenges the 1999 final rule adopting the "good faith/all permits" standard arguing that the rule is contrary to clear Congressional intent, arbitrary and capricious, and an unconstitutional infringement on property rights. Defendants counter that Congress did not express a clear intent regarding how valid existing rights should be defined, and that the 1999 final rule is permissible and reasonable in light of the record, legislative history and language of the SMCRA.

## DISCUSSION

Summary judgment is appropriate where the record shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment must provide the district court with a factual record sufficient to demonstrate the absence of a genuine issue of material fact. See Burke v. Gould, 286 F.3d 513, 517 (D.C. Cir. 2002). This action arises out of a disagreement over the validity of the regulations that OSM promulgated in 1999, and no genuine issue over material facts exists.

### I. STANDARD OF REVIEW

Under the SMCRA, a court must invalidate regulations that are "arbitrary, capricious, or otherwise inconsistent with the law." 30 U.S.C. § 1276(a)(1). To determine if agency action is arbitrary and capricious, district courts employ the

two-part test of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). A court must first determine "[i]f 'Congress has directly spoken to the precise question at issue[.]'" New York v. EPA, No. 03-1380, 2006 WL 662746, at *2 (D.C. Cir. Mar. 17, 2006) (quoting Chevron, 467 U.S. at 842). If Congress clearly expressed its intent, then "'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Id. (quoting Chevron, 467 U.S. at 842-43). However, "if the statute is silent or ambiguous . . . [courts] defer to the agency's interpretation, asking 'whether [it] is based on a permissible construction of the statute.'" Id. (quoting Chevron, 467 U.S. at 843).

To determine Congressional intent and the meaning of the statute under the first prong of Chevron, courts employ "traditional tools of statutory construction[.]" See id.; Automated Power Exch., Inc. v. FERC, 204 F.3d 1144, 1151 (D.C. Cir. 2000). Chevron analysis often begins and ends with the statutory text because "the language of the statute itself is always the best indication of congressional intent." Abbott Labs. v. Young, 920 F.2d 984, 987 (D.C. Cir. 1990). In order to determine whether the plain language of the statute is dispositive, the court must consider not only the particular statutory language at issue, but "'the language and design of the statute as a whole'" as well. Coal Employment Project v. Dole, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)). However the court is not confined to the four corners of the statute and may also consider the statute's legislative history when determining whether Congress clearly expressed its intent. Id.

If Congress has not clearly expressed its intent on the precise issue, considerable weight is due an agency's reasonable construction of a statutory

scheme it is entrusted to administer. Chevron, 467 U.S. at 843-44. "[J]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law." U.S. Postal Serv. v. NLRB, 969 F.2d 1064, 1069 (D.C. Cir. 1992) (quoting Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992)). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Southern Co. Services, Inc. v. FCC, 313 F.3d 574, 579-80 (D.C. Cir. 2002) (internal quotation marks omitted). A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. at 580 (internal quotations marks omitted).

II. CONGRESSIONAL INTENT

NMA argues that Congress clearly announced its intent for the definition of valid existing rights and that OSM's 1999 final rule adopting a "good faith/all permits" standard is contrary to that intent. (See Pl.'s Mem. of Points and Auths. in Supp. of Mot. for Summ. J. ("Pl.'s Mem. Summ. J.") at 7-27.) However, the D.C. Circuit already has explained that "[n]either the statutory language nor the legislative history [of the SMCRA] elaborate on the meaning of the phrase 'valid existing rights.'" Nat'l Wildlife Fed. v. Hodel, 839 F.2d at 749. After more than twenty years of litigation, the only guideposts evident for permissible regulations defining valid existing rights are that an all- permits rule with no good-faith exception is arbitrary and capricious, see PSMRL I, 14 Env't Rep. Cas. at 1091, and that Congress intended some recognition of applicable state law

property rights and an avoidance of takings.[4] See Nat'l Wildlife Fed. v. Hodel, 839 F.2d at 750. OSM has not strayed outside the boundaries of these guideposts because OSM's 1999 final rule includes a good-faith exception, encompasses recognition for state law property rights at the property right demonstration prong of the rule, and reveals concern over minimizing takings. The 1999 final rule is not contrary to Congressional intent.

III. PERMISSIBLE CONSTRUCTION

OSM also considered the relevant factors and articulated a satisfactory explanation for its decision, and so the agency's decision is due Chevron deference. OSM considered four definitions of valid existing rights and analyzed the economic and environmental impact of each alternative. 64 Fed. Reg. at 70775-76. In addition, OSM examined the legislative history of section 522(e), reviewed the extensive relevant litigation and considered the potential takings implications. Id. at 70768-69, 70778-81. OSM also conducted four public hearings, and reviewed approximately seventy-five written comments. Id. at 70767.

In justifying its decision, OSM primarily explained that the "good faith/all permits" rule is consistent with the underlying purposes of SMCRA

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[4] NMA believes the D.C. Circuit's reference in National Wildlife Federation v. Hodel to the legislative history of the SMCRA as providing "some help" in "suggest[ing] that Congress did not intend to infringe on valid property rights or effect takings through § 522(e)" was a declaration from the court that Congress clearly intended to preclude any permits-based standard for defining valid existing rights. (*See* Pl.'s Mem. Summ. J. at 33- 34 (discussing Nat'l Wildlife Fed. v. Hodel, 839 F.2d at 750).) However, the court's cautious language counsels against such a broad reading. Moreover, in that case the D.C. Circuit affirmed a ruling of the district court that a permits-based standard was consistent with the SMCRA. Nat'l Wildlife Fed. v. Hodel, 839 F.2d at 750-51.

and with current state regulatory regimes. When the SMCRA was enacted in 1977, it was designed as a compromise "both to protect the environment and to ensure an adequate supply of coal to meet the nation's energy requirements." Nat'l Wildlife Fed'n v. Lujan, 950 F.2d 765, 770 (D.C. Cir. 1991) (citing 30 U.S.C. § 1202(f)). The Senate Committee on Energy and Natural Resources concluded that § 522(e) was specifically designed to "restore more balance to Federal land use decisions regarding mining." S. Rep. No. 95-128, at 55 (1977). The "good faith/all permits" standard adopted by OSM reasonably strikes a balance between protecting the environment and ensuring an adequate supply of coal. Of the definitions of valid existing rights OSM considered, the "good faith/all permits" definition is "the most protective of the lands listed in section 522(e)." 64 Fed. Reg. at 70776. An environmental impact study cited by OSM predicted that implementing the "ownership and authority" standard, as opposed to the "good faith/all permits" standard, would open up 3,062 more acres of land to surface coal mining. Id. The "good faith/all permits" standard also "protects the interests of those persons who had taken concrete steps to obtain regulatory approval for surface coal mining operations on lands listed in section 522(e) before those lands came under the protection of . . . section 522(e)." Id. Additionally, OSM reports that its final rule would have no "significant economic impact on the mining industry or the cost of producing and delivering coal." Id.

OSM reports, and NMA does not dispute, that the "good faith/all permits" standard is also consistent with current state regulatory standards. In fact, many state regulatory programs have relied on the "good faith/all permits" standard for approximately twenty years. (See Federal Defendants' Reply Mem. at 10.) Prior to the issuance of the 1999 final regulation, twenty state regulatory

programs had incorporated some version of the "good faith/all permits" standard or the "all permits" standard into their own regulatory frameworks. 64 Fed. Reg. at 70776. Further, the "good faith/all permits" rule previously has been applied as the federal standard, having been implemented in 1980 and 1986 at the direction of OSM and in the early 1990s at the direction of Congress. OSM's belief that the adoption of a "good faith/all permits" standard would cause the least disruption to existing regulatory programs was reasonable. Id.

Because OSM met its obligations to review the relevant information and articulate a rational explanation for its actions, its decision to adopt the "good faith/all permits" definition of valid existing rights will be accorded deference.

## IV. CONSTITUTIONAL CLAIMS

### A. Takings

NMA argues that the "good faith/all permits" test constitutes a Fifth Amendment taking because it eliminates the right to mine in categories of land covered by § 522(e). (Pl.'s Mem. Summ. J. at 39-40.) The Fifth Amendment provides that "[no] private property [shall] be taken for public use, without just compensation." In VSMRA, the Supreme Court held that the "mere enactment" of SMCRA does not constitute a taking, nor does it, "on its face, deprive owners of land within its reach of economically viable use of their land since it does not proscribe nonmining uses of such land." 452 U.S. at 296 n.37.

NMA has not demonstrated that the new regulation results in an unconstitutional taking. In addition to those reasons set forth by the Supreme Court, it is clear that if valid existing rights are denied, compensation is available under the Tucker Act. See 28 U.S.C. § 1491; see also United States v. Riverside Byview Homes, Inc. 474 U.S. 121, 127-28

(1985) (holding that requiring a person to obtain a permit before engaging in a certain use of his property does not "take" the property, but even if it did, "so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional.") Because compensation would be available if property is taken, no unconstitutional taking results from the 1999 final rule.

B. Due Process

NMA also contends that OSM has not provided property rights holders "'a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements'" in violation of the Due Process Clause. (*See* Pl.'s Mem. Summ. J. at 44 (quoting United States v. Locke, 471 U.S. 84, 108 (1985).)

In a pre-SMCRA opinion, the Supreme Court held that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations[,] . . . even [if] the effect of the legislation is to impose a new duty or liability based on past acts." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976). In fact, the SMCRA grew out of decades of discussions about banning surface coal mining, including various Congressional bills that were vetoed by President Ford. (See Intervenor Defs.' Mot. for Summ. J. at 24-25.) In any event, as is noted above, all affected parties had numerous opportunities to comment on the appropriate standard during the multiple rulemaking processes. As such, plaintiff received all the process it was due. The promulgation of the 1999 final rule did not violate the Due Process Clause of the Fifth Amendment to the Constitution.

## CONCLUSION

OSM's "good faith/all permits" standard is not inconsistent with the discernable Congressional intent related to § 522(e) of the SMCRA. Moreover, OSM considered the relevant factors and supplied a rational explanation for its conclusion. Therefore, the 1999 final rule is not arbitrary, capricious, inconsistent with the law or otherwise unreasonable, and is entitled to deference. In addition, the 1999 final rule does not constitute a takings violation, nor does it deprive property rights holders of due process. Accordingly, NMA's motion for summary judgment will be denied and federal defendants' and intervenor defendants' motion for summary judgment will be granted. A final Order accompanies this Memorandum Opinion.

SIGNED this fourth day of May, 2006.

/s/
RICHARD W. ROBERTS
United States District Judge

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 06-5199** **September Term, 2007**

**00cv00283**

**Filed On: March 14, 2008 [1105748]**

National Mining Association,

Appellant,

v.

Dirk Kempthorne, Secretary of the Interior, et al.,

Appellee.

**BEFORE:** Garland and Griffith, Circuit Judges, and Edwards, Senior Circuit Judge.

**ORDER**

Upon consideration of appellant's petition for rehearing filed February 29, 2008, it is

ORDERED that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer

BY:

Michael C. McGrail
Deputy Clerk

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**No. 06-5199** **September Term, 2007**

**00cv00283**

**Filed On: March 14, 2008 [1105748]**

National Mining Association,
Appellant,

v.

Dirk Kempthorne, Secretary of the Interior, et al.,
Appellee.

**BEFORE:** Sentelle, Chief Judge, and Ginsburg, Henderson,* Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Edwards, Senior Circuit Judge

**ORDER**

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer

BY:

Michael C. McGrail
Deputy Clerk

* Circuit Judge Henderson did not participate in this matter.

## APPENDIX D

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

June 4, 2008

Ms. Catherine E. Stetson
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004

Re: National Mining Association
v. Dirk Kempthorne, Secretary of the Interior, et al.
Application No. 07A945

Dear Ms. Stetson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on June 4, 2008 extended the time to and including July 12, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

**William K. Suter,**
Clerk

by /s/_____

Gail Johnson
Case Analyst

# APPENDIX E
## LIST OF OVER 100 FEDERAL STATUTES PROTECTING VALID EXISTING RIGHTS

1. 10 U.S.C. § 7439(b)
2. 16 U.S.C. § 47e
3. 16 U.S.C. § 80a
4. 16 U.S.C. § 90
5. 16 U.S.C. § 90a
6. 16 U.S.C. § 90a-1
7. 16 U.S.C. § 90c-1(b)
8. 16 U.S.C. § 90e(a)
9. 16 U.S.C § 90e-1
10. 16 U.S.C. § 110c(c)(1), (d)(1)
11. 16 U.S.C. § 111c
12. 16 U.S.C. § 228b(a)
13. 16 U.S.C. § 271

14. 16 U.S.C. § 272(a)(1)

15. 16 U.S.C. § 272d(b)(1)

16. 16 U.S.C. § 272g(a)(3)

17. 16 U.S.C. § 273(a)

18. 16 U.S.C. § 398c

19. 16 U.S.C. § 403-3

20. 16 U.S.C. § 403k-1

21. 16 U.S.C. § 405

22. 16 U.S.C. § 406d-1

23. 16 U.S.C. § 408e

24. 16 U.S.C. § 410bb(c)

25. 16 U.S.C. § 410hh-2

26. 16 U.S.C. § 410hh-5

27. 16 U.S.C. § 410ii(a)(3)

28. 16 U.S.C. § 410mm-1(d)

29. 16 U.S.C. § 410zz-2(c)

30. 16 U.S.C. § 410aaa-4

31. 16 U.S.C. § 410aaa-25

32. 16 U.S.C. § 410aaa-47

33. 16 U.S.C. § 410aaa-48

34. 16 U.S.C. § 410aaa-49(b)(3)

35. 16 U.S.C. § 410fff-2(d)

36. 16 U.S.C. § 410fff-5(c)

37. 16 U.S.C. § 410fff-7

38. 16 U.S.C. § 410hhh-5(e)(1)

39. 16 U.S.C. § 450y

40. 16 U.S.C. § 450oo

41. 16 U.S.C. § 460q

42. 16 U.S.C. § 460q-5

43. 16 U.S.C. § 460v

44. 16 U.S.C. § 460v-4

45. 16 U.S.C. § 460y-5(a)

46. 16 U.S.C. § 460z

47. 16 U.S.C. § 460z-8

48. 16 U.S.C. § 460aa-9

49. 16 U.S.C. § 460dd-2(a)

50. 16 U.S.C. § 460gg-8

51. 16 U.S.C. § 460*ll*-1(b)

52. 16 U.S.C. § 460mm-1(a)-(c)

53. 16 U.S.C. § 460mm-2

54. 16 U.S.C. § 460mm-4(b)

55. 16 U.S.C. § 460nn-3(a)

56. 16 U.S.C. § 460oo(d)(1)-(2)

57. 16 U.S.C. § 460qq(c), (f)

58. 16 U.S.C. § 460rr-2(a), (d)

59. 16 U.S.C. § 460uu-32(a)

60. 16 U.S.C. § 460uu-46(d)(2)

61. 16 U.S.C. § 460vv-3

62. 16 U.S.C. § 460xx-1(c)

63. 16 U.S.C. § 460yy-1(g)

64. 16 U.S.C. § 460aaa-2(a)

65. 16 U.S.C. § 460aaa-5

66. 16 U.S.C. § 460bbb-4(d)

67. 16 U.S.C. § 460bbb-6(a), (c)

68. 16 U.S.C. § 460ccc-2(a)

69. 16 U.S.C. § 460ccc-5(a)

70. 16 U.S.C. § 460ddd(e)

71. 16 U.S.C. § 460ggg(b)

72. 16 U.S.C. § 460ggg-1(b)(1)

73. 16 U.S.C. § 460ggg-2(b)(1)

74. 16 U.S.C. § 460hhh-2(a)

75. 16 U.S.C. § 460hhh-6(a)

76. 16 U.S.C. § 460iii-2(d)

77. 16 U.S.C. § 460jjj-2(b)

78. 16 U.S.C. § 460mmm-4(c), (e), (*l*)(5)(C)

79. 16 U.S.C. § 460nnn-2

80. 16 U.S.C. § 460nnn-23(g)

81. 16 U.S.C. § 460nnn-81(a)

82. 16 U.S.C. § 460nnn-105(c)

83. 16 U.S.C. § 460ooo-2(b)

84. 16 U.S.C. § 460ooo-4(f), (j)

85. 16 U.S.C. § 460ppp-4

86. 16 U.S.C. § 460ppp-6(b)

87. 16 U.S.C. § 460qqq-3(e)(1)

88. 16 U.S.C. § 460qqq-4(a)

89. 16 U.S.C. § 460rrr-5(d)

90. 16 U.S.C. § 460sss(c)(2)

91. 16 U.S.C. § 497c(j)

92. 16 U.S.C. § 539(b)

93. 16 U.S.C. § 539a

94. 16 U.S.C. § 539g(d)

95. 16 U.S.C. § 539h(e)

96. 16 U.S.C. § 539i(c)

97. 16 U.S.C. § 539j(c)

98. 16 U.S.C. § 539k(b)(4)

99. 16 U.S.C. § 539*l*(d)(1)(B)

100. 16 U.S.C. § 541

101. 16 U.S.C. § 541f

102. 16 U.S.C. § 543c(g)(1)-(2)

103. 16 U.S.C. § 544e(c)(2)

104. 16 U.S.C. § 544f(b), (m)

105. 16 U.S.C. § 544g(d)(5)

106. 16 U.S.C. § 544*l*(f)

107. 16 U.S.C. § 545a(i)

108. 16 U.S.C. § 545b(d)(7)(A)

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111. 16 U.S.C. § 695p

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113. 16 U.S.C. § 1133(d)(3)

114. 16 U.S.C. § 1274(a)(62)(C)

115. 16 U.S.C. § 1279(b)

116. 16 U.S.C. § 1280(a)(ii)-(iii), (b)

117. 16 U.S.C. § 1604(h)(3)(i)

118. 16 U.S.C. § 3144(c)

119. 16 U.S.C. § 3200(a)

120. 16 U.S.C. § 3215(a)(1)

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123. 25 U.S.C. § 566d

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127. 25 U.S.C. § 903d(b)-(c)

128. 25 U.S.C. § 1300i-1(c)(2)

129. 25 U.S.C. § 1777c(c)(1), (c)(4)

130. 25 U.S.C. § 1780e(d)-(d)(1), (d)(4)(A)

131. 25 U.S.C. § 1780h

132. 25 U.S.C. § 1780i

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139. 43 U.S.C. § 1610(a)(1)-(2)

140. 43 U.S.C. § 1613(g)

141. 43 U.S.C. § 1615(a)

142. 43 U.S.C. § 1618(a)-(b), (c)(2), (c)(3)(B)

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144. 43 U.S.C. § 1629g(a)(6)(A)

145. 43 U.S.C. § 1629h(d), (g)

146. 43 U.S.C. § 1633(c)

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161. 48 U.S.C. § 1545(b)(2)

162. 48 U.S.C. § 1705(a)

163. 48 U.S.C. § 1971(a)

No. 08-63

# In the Supreme Court of the United States

NATIONAL MINING ASSOCIATION, PETITIONER

*v.*

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION


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## QUESTION PRESENTED

The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, generally prohibits its surface coal mining operations in certain specified areas but makes that prohibition "subject to valid existing rights." 30 U.S.C. 1272(e). The question presented is whether the definition of "valid existing rights" contained in regulations issued by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement in 1999 is a permissible construction of the SMCRA under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

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# In the Supreme Court of the United States

No. 08-63

NATIONAL MINING ASSOCIATION, PETITIONER

*v.*

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 512 F.3d 702. The opinion of the district court (Pet. App. 17a-36a) is not published in the *Federal Supplement* but is available in 36 Envtl. L. Rep. (Envtl. L. Inst.) 20,090, and is available at 2006 WL 1194224.

### JURISDICTION

The judgment of the court of appeals was entered on January 15, 2008. A petition for rehearing was denied on March 14, 2008 (Pet. App. 37a-38a). On June 4, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 12, 2008, and the petition was filed on July 14, 2008

(Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1977, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA or Act), 30 U.S.C. 1201 *et seq.* In the Act's statement of purpose, Congress declared that its aim was to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations," 30 U.S.C. 1202(a), while "strik[ing] a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy," 30 U.S.C. 1202(f). See *Citizens Coal Council* v. *Norton*, 330 F.3d 478, 480 (D.C. Cir. 2003) (upholding regulations defining "surface coal mining operations"), cert. denied, 540 U.S. 1180 (2004).

The SMCRA is administered by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSM). See 30 U.S.C. 1211(c). States may assume jurisdiction over surface coal mining operations on non-Indian lands within their borders by developing a regulatory program that is no less stringent than the SMCRA and no less effective than federal regulations issued under it, see 30 U.S.C. 1253, 1272(a); 30 C.F.R. 730.5, 731.14, 732.15, but OSM retains oversight authority even in those States, see *National Mining Ass'n* v. *United States Dep't of the Interior*, 251 F.3d 1007, 1012 (D.C. Cir. 2001).

2. The SMCRA identifies five types of areas where, subject to certain exceptions, "no surface coal mining operations * * * shall be permitted." 30 U.S.C. 1272(e); see 30 U.S.C. 1272(e)(1)-(5) (listing, *inter alia*, lands within the boundaries of the National Park Sys-

tem, federal lands within the boundaries of a national forest, lands "within one hundred feet of the outside right-of-way line of any public road," and lands "within three hundred feet" of homes, schools, churches, and community or institutional buildings). That general prohibition does not apply, however, to "operations * * * which exist[ed] on August 3, 1977," 30 U.S.C. 1272(e), the date on which the SMCRA was enacted. It is also made "subject to valid existing rights." *Ibid.*

The issues presented in this case involve whether the Department of the Interior has permissibly interpreted the phrase "valid existing rights" in 30 U.S.C. 1272(e).

a. The first permanent regulations interpreting the SMCRA were published on March 13, 1979. See 44 Fed. Reg. 14,902 (1979 regulations). The 1979 regulations defined "valid existing rights" as encompassing two types of situations. The first was where the property owner "[h]ad been validly issued, on or before August 3, 1977, all State and Federal permits necessary to conduct such operations on those lands." *Id.* at 15,342. That standard is known as the "all-permits" standard. The second situation covered by the 1979 regulations was where a property owner "[could] demonstrate to the regulatory authority that the coal [was] both needed for, and immediately adjacent to, an on-going surface coal mining operation for which all permits were obtained prior to August 3, 1977." *Ibid.* That standard is known as the "needed-for-and-adjacent-to" standard.

Several parties, including the National Coal Association (NCA), one of petitioner's predecessors, and the National Wildlife Foundation (NWF) challenged the 1979 regulations. NCA challenged the "all permits standard," while NWF supported it. On February 26, 1980, the district court issued an opinion in which it agreed

with the NCA that a party claiming the right to conduct surface coal mining operations under the "valid existing rights" provision of 30 U.S.C. 1272(e) should not be required to have obtained all permits before the SMCRA's August 3, 1977, enactment. See *In re Permanent Surface Mining Regulation Litig.*, 14 Env't Rep. Cas. (BNA) 1083, 1091 (D.D.C. 1980) *(PSMRL)*. Instead, the district court concluded that "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date should suffice," and it remanded the relevant sub-paragraph of the 1979 regulations to the agency. *Ibid.* On May 16, 1980, the district court issued a further opinion in which it "ordered the Secretary [of the Interior] to affirmatively disapprove any provision in a State program under consideration which incorporate[d] a suspended or remanded Federal regulation." 45 Fed. Reg. 51,548 (1980).[1]

While that litigation was pending, "OSM recognized the need to propose changes to certain sections of" the 1979 regulations. 45 Fed. Reg. at 51,548. OSM issued orders suspending various sections of the 1979 regulations in November 1979, December 1979, and January 1980. *Ibid.* On August 4, 1980, OSM issued an order (August 1980 suspension order) that suspended the portion of the 1979 regulations that defined "valid existing rights" "insofar as it require[d] that all permits must have been obtained prior to August 3, 1977." *Ibid.* The August 1980 suspension order stated: "Pending further rulemaking, the Secretary will interpret this regulation as requiring a good faith effort to obtain all permits."

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[1] NCA and others appealed the district court's decisions, but the court of appeals never reached the merits because OSM was reconsidering the 1979 rules. *PSMRL*, No. 80-1810 (D.C. Cir. Feb. 1, 1983).

*Ibid.* That standard is known as the "good faith/all permits" standard. See 64 Fed. Reg. 70,770 (1999).

b. In 1982, OSM published proposed regulations that contained six possible definitions of "valid existing rights" in 30 U.S.C. 1272(e). See 47 Fed. Reg. 25,279-25,282. When OSM finalized those regulations the following year, it rejected all six options and instead adopted a "takings" standard. See 48 Fed. Reg. 41,313-314 (1983) (1983 regulations). Under that standard, a property owner would be deemed to have "valid existing rights" to conduct surface coal mining operations "if the application of any of the prohibitions contained in [30 U.S.C. 1272(e)] to the property interest that existed on [August 3, 1977] would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution." *Id.* at 41,349.[2]

The NWF and others challenged the 1983 regulations' definition of "valid existing rights," contending that it was issued without sufficient notice and comment. The district court agreed, and remanded that provision to the agency for additional proceedings. See *PSMRL*, 22 Env't Rep. Cas. (BNA) 1557, 1564 (D.D.C. 1985), aff'd in part and rev'd in part *sub nom.*, *NWF* v. *Hodel*, 839 F.2d 694 (D.C. Cir. 1988); see 64 Fed. Reg. at 70,770.

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[2] The 1983 regulations also provided that the "valid existing rights" exception to the general prohibition contained in 30 U.S.C. 1272(e) applied not only to lands that were covered by that provision as of the SMCRA's August 3, 1977, enactment, but also to lands that become covered by that section at a later date, such as "when a park is created or expanded or a protected structure is built." 64 Fed. Reg. at 70,770; see *ibid.* (describing this provision as "continually created VER"); 48 Fed. Reg. at 41,349. The D.C. Circuit upheld the validity of the "continually-created VER" concept in *NWF* v. *Hodel*, 839 F.2d 694, 748-751 (1988).

On November 20, 1986, OSM issued an order suspending portions of the 1983 regulations in response, in part, to the district court's March 22, 1985, decision. See 51 Fed. Reg. 41,952 (1986) (November 1986 suspension order). In the November 1986 suspension order, OSM suspended "the definition of 'valid existing rights'" contained in the 1983 regulations. *Id.* at 41,961. The effect of that suspension was to reinstate the "good faith/all permits" standard that had been in place before the issuance of the 1983 regulations. *Id.* at 41,954-41,955.

c. On December 27, 1988, OSM proposed to amend the regulations in order to permit an applicant to demonstrate "valid existing rights" by satisfying one of three standards: (1) the good faith/all permits standard; (2) the needed-for-and-adjacent-to standard; or (3) a new "[o]wnership and [a]uthority" standard. 53 Fed. Reg. 52,374, 52,383 (December 1988 proposal). "Under the ownership and authority standard, a person could establish [valid existing rights] by demonstrating both a property right to the coal and the right to mine it by the method intended, as determined by State law." 64 Fed. Reg. at 70,771. On July 21, 1989, OSM withdrew the December 1988 proposal for further study. See 54 Fed. Reg. 30,557 (1989).

d. On July 18, 1991, OSM proposed a definition under which an applicant could demonstrate "valid existing rights" by satisfying the good faith/all permits standard, the needed-for-and-adjacent-to standard, *or* the takings standard. See 56 Fed. Reg. 33,163-33,164 (1991 proposed rule).

The 1991 proposed rule was never finalized. In Section 2504(b) of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 3105, Congress directed the Secretary of the Interior to "continue in force and effect,"

for at least one additional year, the "valid existing rights" standard contained in the November 1986 suspension notice, which, as noted previously, incorporated the good faith/all permits and needed-for-and-adjacent-to standards. In addition, the relevant appropriations acts for the next two years specifically prohibited the Department of the Interior from using any appropriated funds to publish a rule defining "valid existing rights" or to disapprove any existing state definition of that term. See Act of Nov. 11, 1993, Pub. L. No. 103-138, § 111, 107 Stat. 1399; Act of Sept. 30, 1994, Pub. L. No. 103-332, § 111, 108 Stat. 2519.

3. a. On January 31, 1997, OSM published a proposed rule under which an applicant seeking to demonstrate "valid existing rights" would be required to satisfy either the good faith/all permits standard or the needed-for-and-adjacent-to standard. 62 Fed. Reg. 4844-4846, 4860.

b. On December 17, 1999, OSM published the final rule that is at issue in this case. See 64 Fed. Reg. at 70,766 (1999 regulations). The 1999 regulations define "valid existing rights" as "a set of circumstances under which a person may, subject to regulatory authority approval, conduct surface coal mining operations on lands where [30 U.S.C. 1272(e)] would otherwise prohibit such operations." 30 C.F.R. 761.5. The 1999 regulations provide that, in order to establish "valid existing rights," a claimant must first demonstrate that, at the time the land came under the protection of Section 1272(e), some legally binding document vested the claimant "with the right to conduct the type of surface coal mining operations intended." 30 C.F.R. 761.5(a). If that initial state-law-based standard is satisfied, the 1999 regulations provide that the claimant must also satisfy either the

good faith/all permits standard or the needed-for-and-adjacent-to standard. See 30 C.F.R. 761.5(b).[3]

The preamble to the 1999 regulations spans 65 pages in the *Federal Register*. 64 Fed. Reg. at 70,766-70,830. The preamble contains an exhaustive review of the SMCRA and its legislative history, OSM's previous efforts to define "valid existing rights," and the case law arising from those attempts. See *id.* at 70,767-70,771. It also explains the provisions of the new regulations, discusses how they coincide with or differ from prior regulations, responds to comments, and explains why OSM chose the options it did. See *id.* at 70,771-70,783, 70,787-70,790. The preamble specifically addresses why OSM rejected the taking and ownership-and-authority standards. See *id.* at 70,783-70,786. It also contains an extensive discussion of how the definition of "valid existing rights" adopted in the 1999 regulations "[c]ompares with" the use of the words "valid existing rights" "[u]nder [o]ther [f]ederal [s]tatutes." *Id.* at 70,793-70,794; see Pet. App. 23a-29a (district court's description of the preamble).

With respect to the impact of the alternatives it considered, OSM concluded that, over the 20-year period from 1995 to 2015, the "good faith/all permits" standard would result in mining of only 2855 fewer acres than a "takings" standard and 3000 fewer acres than the "ownership and authority" standard. See Pet. App. 25a (cit-

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[3] The 1999 regulations set out a different mechanism for establishing "valid existing rights" with respect to use or construction of roads. In that context, a claimant may either: (1) satisfy the test described above; or (2) establish that a road, right-of-way, or permit to construct a road already existed at the time the property became covered by 30 U.S.C. 1272(e), and that the claimant had a legal right to use that road or right-of-way for surface coal mining operations. See 30 C.F.R. 761.5(c).

ing 64 Fed. Reg. at 70,776). Against that background, OSM found only "negligible differences among the alternatives in terms of their economic impact." 64 Fed. Reg. at 70,776.

4. a. Petitioner filed a complaint and petition for judicial review under 30 U.S.C. 1276(a)(1), which authorizes review of "[a]ny action of the Secretary [of the Interior] to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to [the SMCRA]." That section also provides that "[a]ny action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law." *Ibid.*

b. The district court granted summary judgment in favor of respondents. Pet. App. 17a-36a. The court quoted the D.C. Circuit's statement in *NWF* v. *Hodel*, 839 F.2d 694, 749 (1988), that "[n]either the statutory language nor the legislative history [of the SMCRA] elaborate[s] on the meaning of the phrase 'valid existing rights.'" Pet. App. 31a. The district court concluded that the 1999 regulations satisfied the only evident guideposts of congressional intent applicable at *Chevron* step one because they "include[] a good-faith exception, encompass[] recognition for state law property rights at the property right demonstration prong * * *, and reveal[] concerns over minimizing takings." *Id.* at 32a.

The district court concluded at *Chevron* step two that OSM had "considered the relevant factors" and "articulate[d] a rational explanation for its actions." Pet. App. 32a, 34a. The court determined that "[t]he 'good faith/all permits' standard adopted by OSM reasonably strikes a balance between protecting the environment and ensuring an adequate supply of coal." *Id.* at 33a; see

*ibid.* (noting that OSM had determined "that its final rule would have no 'significant economic impact on the mining industry and the cost of producing or delivering coal'") (quoting 64 Fed. Reg. at 70,776). The district court further noted that "OSM reports, and [petitioner] does not dispute, that the 'good faith/all permits' standard is * * * consistent with current state regulatory standards," and it pointed out that the same standard had "been implemented in 1980 and 1986 at the direction of OSM and in the early 1990s at the direction of Congress." *Id.* at 33a-34a.

The district court rejected petitioner's contention that the 1999 regulations violated either the Just Compensation or Due Process Clause of the Fifth Amendment to the United States Constitution. Pet. App. 34a-35a. The court noted that this Court's decision in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), "held that the 'mere enactment' of [the] SMCRA [did] not constitute a taking, nor [did] it, 'on its face, deprive owners of land within its reach of economically viable use of their land since [the SMCRA] does not proscribe nonmining uses of such land." Pet. App. 34a (quoting *Hodel*, 452 U.S. at 296 n.37). The district court held that petitioner "ha[d] not demonstrated that the new regulation results in an unconstitutional taking," both for the reasons identified in *Hodel* and because "it is clear that if valid existing rights are denied, compensation is available under the Tucker Act." *Ibid.*

5. The court of appeals affirmed in a unanimous published opinion. Pet. App. 1a-16a. The court first determined "that [valid existing rights] is an ambiguous phrase." *Id.* at 7a-8a. It noted that, in its 1986 decision in *NWF*, it "ha[d] * * * determined that the phrase is subject to multiple and divergent interpretations" and

"that the legislative history of the SMCRA does not illuminate the meaning of [valid existing rights]." *Id.* at 8a & n.2 (citing *NWF*, 839 F.2d at 748-751). The court of appeals stated that "[t]he major source of [valid existing rights'] ambiguity is the word 'rights.'" *Id.* at 8a. It explained that that word has "multiple and often vague meanings," some of which are synonymous with "property rights" and others of which are not. *Id.* at 8a-10a. The court of appeals also concluded that the term "valid" was ambiguous as used in this context. *Id.* at 9a. It observed that if "[valid existing rights] operates as a 'term of art,' as [petitioner] suggests, it is as a tool by which Congress delegates policymaking authority through ambiguity." *Id.* at 10a.

The court of appeals next held that the 1999 regulations' definition of "valid existing rights" was "a reasonable interpretation of the statute." Pet. App. 12a. The court viewed the statute as a whole as making clear that "protecting against the harmful effects of surface mining" was "the primary aim of the [SMCRA]," and it stated that it was "not surprising that the Secretary has promulgated an interpretive rule that cuts against the interests of some miners." *Id.* at 12a-13a. The court of appeals also concluded that petitioner's "suggestion that the SMCRA effected robust protection of miners' property rights is belied by the way Congress used the word 'property' in that statute." *Id.* at 13a. It noted that "only one [of the 29 instances in which that term appears in the SMCRA] refers to protecting the property rights of subsurface owners of the mineral estate," and it determined that "several mentions of 'property' [in the Act] run counter to miners' property rights, in that they authorize government entry onto mined property to assess and remedy environmental degradation caused by

strip mining." *Ibid.* The court also stated that petitioner's accusation of "flip-flopping" by OSM "ignore[d] the agency's obligation to 'consider varying interpretations and the wisdom of its policy on a continuing basis.'" *Id.* at 13a n.5 (quoting *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 863-864 (1984) (*Chevron*)).

The court of appeals agreed with petitioner that the "canon of constitutional avoidance trumps *Chevron* deference." Pet. App. 14a. The court emphasized, however, that "we do not abandon *Chevron* deference at the mere mention of a possible constitutional problem: the argument must be serious," and the court determined that the constitutional arguments in this case did not satisfy that standard. *Ibid.* Petitioner had argued "that the 1999 Rule * * * work[s] a taking of subsurface coal interests." *Id.* at 15a. The court of appeals responded that "[a] taking * * * is only unconstitutional if the government fails to pay just compensation, and the Tucker Act provides for such a remedy." *Ibid.*

The court of appeals emphasized that it did not "say that the canon of constitutional avoidance can be ignored with respect to every argument sounding in the Takings Clause." Pet. App. 15a. The court noted that this Court has recognized that, even where just compensation would be available for individual takings, the doctrine of constitutional avoidance applies "if a statute creates 'an identifiable class of cases in which application of [the] statute will necessarily constitute a taking.'" *Id.* at 15a-16a (quoting *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 128 n.5 (1985)). The court of appeals also observed that it had previously "refused *Chevron* deference to an agency interpretation that created an 'identifiable class' of takings victims." *Id.* at 16a (citing *Bell Atl. Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445 (D.C.

Cir. 1994)). But the court of appeals concluded that petitioner "ha[d] shown no 'identifiable class' of miners whose taking claims would expose the Treasury to such liability." *Ibid.* The court noted that petitioner had declined to contend at oral argument "that the government would be on the hook for a 'massive and unforseen' sum" if the 1999 regulations were upheld, and it stated that "[t]he record is devoid of evidence it is so." *Ibid.* The court thus viewed petitioner as having made an "implicit concession that the 1999 Rule will have relatively insignificant takings implications that can be readily addressed in the Court of Claims," and it noted that it had previously concluded that "[t]he avoidance canon is not applicable when the statute or regulation would effect a taking, if at all, only in certain circumstances." *Ibid.* (quoting *National Mining Ass'n* v. *Babbitt*, 172 F.3d 906, 917 (D.C. Cir. 1999)).

6. Petitioner filed a petition for rehearing en banc. That petition was denied after no judge requested a vote on it. Pet. App. 38a.

## ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. The court of appeals merely upheld a regulatory standard that the Department of the Interior has employed since 1986, and its decision cannot be expected to have broader implications. Further review is not warranted.

1. Petitioner first contends (Pet. 15-25) that the District of Columbia Circuit erred in concluding that the words "valid existing rights" in Section 1272(e) are ambiguous under *Chevron* step one. See *Chevron U.S.A.*,

*Inc.* v. *NRDC*, 467 U.S. 837 (1984). That claim does not merit further review.

a. The premise of petitioner's argument is that the court of appeals reached the conclusion that it did solely because the word "rights" "has multiple entries in the dictionary." Pet. 15; see Pet. i. That premise is erroneous.

Like the district court before it, see Pet. App. 31a, the court of appeals explained that it had *already* concluded—20 years ago—that the entire phrase "valid existing rights" in 30 U.S.C. 1272(e) "is subject to multiple and divergent interpretations." *Id.* at 8a (citing *NWF* v. *Hodel*, 839 F.2d 694, 748-751 (D.C. Cir. 1988)); *id.* at 8a n.2 (same). In *NWF*, the D.C. Circuit rejected a challenge to the "continually-created [valid existing rights]" portion of the 1983 regulations. See 839 F.2d at 748-751; note 2, *supra*. The panel in that case observed that "[n]either the statutory language nor the legislative history elaborate[s] on the meaning of the phrase 'valid existing rights.'" 839 F.2d at 749. The *NWF* panel concluded that "[t]he statutory language appear[ed] to be susceptible to either" the interpretation that it applies exclusively to rights that were "existing as of the date of [the SMCRA's] enactment" or that it applies as well to situations where "a permit ha[d] been validly issued" before the land came under the protection of 30 U.S.C. 1272(e). 839 F.2d at 750. The panel also noted that the SMCRA's legislative history "d[id] not answer the specific question before [it]," though it observed that a committee report indicated that Congress did not intend for "operating mines" to "be shut down." *Ibid.* (citing H.R. Rep. No. 218, 95th Cong, 1st Sess. 94 (1977)).

In this case, the court of appeals could have justified its conclusion that the phrase "valid existing rights" in

Section 1272(e) was ambiguous based solely on that established conclusion in *NWF*. But the panel went further. It explained that the "major source"—not the only source—of the ambiguity in "valid existing rights" was Congress's use of the word "rights." Pet. App. 8a (emphasis added). Petitioner is correct (Pet. 13-14) that the panel relied in part on dictionary definitions of the word "rights" in reaching that conclusion. Pet. App. 8a-9a. But consulting dictionaries is one of the standard techniques of statutory interpretation,[4] and petitioner *itself* cited dictionary definitions of "rights" in its brief to the court of appeals. *Id.* at 8a (citing Pet. C.A. Br. 34). In addition, the court of appeals *also* examined the meaning of "valid," and concluded that that term too failed to resolve the ambiguity it had already identified in *NWF*. *Id.* at 9a.[5] Nor did the court of appeals ignore SMCRA's

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[4] See, *e.g.*, *Cuellar* v. *United States*, 128 S. Ct. 1994, 2000 (2008); *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008); *Begay* v. *United States*, 128 S. Ct. 1581, 1586 (2008); *Knight* v. *Commissioner*, 128 S. Ct. 782, 789 (2008); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2510 (2007).

[5] The court of appeals also found it "illuminating" that extensive academic commentary about the meaning of "valid existing rights" in 30 U.S.C. 1272(e) had "reached no consensus" and been "unable to distill a single, clear meaning" of that phrase. Pet. App. 10a n.3. The court observed that a subject-matter expert in whose views petitioner had "place[d] great faith"—and who both petitioner and amicus American Petroleum Institute (API) continue to cite before this Court (see Pet. 16; API Amicus Br. 9, 15, 23)—had acknowledged that Congress had not "list[ed] what interests it mean[t] to include within the 'valid existing rights' phrase." Pet. App. 10a n.3 (quoting Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 Harv. Envtl. L. Rev. 1, 19 (1987)). Cf. Jan G. Laitos, *The Nature and Consequence of "Valid Existing Rights" Status in Public Land Law*, 5 J. Min. L. & Pol'y 399, 399-400 (1989-1990) (observing that use of the term "valid existing rights" exemplifies

structure. It simply did not find petitioner's few structural arguments persuasive enough to warrant discussion in the context of *Chevron* step one. See *id.* at 12a-13a (addressing statutory context when assessing reasonableness of OSM's interpretation under *Chevron* step two).

Petitioner's claim that the D.C. Circuit applied a "novel approach to *Chevron*" in this case (Pet. 25) under which "a single word" can render an entire statutory phrase ambiguous (Pet. 15) is further belied by its subsequent decisions. The D.C. Circuit has continued—in decisions issued after its decision in this case—to rely on the very precedents petitioner accuses it of having abandoned here. Compare Pet. 19 (quoting this Court's statement in *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), that "[a]mbiguity is a creature not of definitional possibilities but of statutory context"), with *HolRail, LLC* v. *STB*, 515 F.3d 1313, 1317 (D.C. Cir. 2008) ("Although the term 'cross' may have multiple meanings in some circumstances, '[a]mbiguity is a creature not of definitional possibilities but of statutory context'" (quoting *Brown*, 513 U.S. at 118)).

b. Petitioner also fails to demonstrate that the district court and the court of appeals erred in concluding that the phrase "valid existing rights" in Section 1272(e) is ambiguous with respect to the specific question presented here. That phrase is undefined in the statute, and its meaning is not specifically addressed in the SMCRA's legislative history. See *NWF*, 839 F.2d at 749.

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Congress's "tendency to rely on unclear wording to express a federal law-maker's intent," and stating that "[b]ecause the phrase is never defined, one is never certain what kinds of interests are intended to fall within its scope").

Petitioner and its amici err in asserting that the 1977 Senate Report indicates that the "fundamental purpose" of the "valid existing rights" language was "to clarify that '*all valid existing property rights must be preserved.*'" Pet. 9 (quoting S. Rep. No. 128, 95th Cong., 1st Sess. 56 (1977) (*Senate Report*)); accord National Council of Coal Lessors (NCCL) Amicus Br. 4. The section of the *Senate Report* in which the quoted language appears does not refer to the "valid existing rights" language in Section 1272(e). Instead, it is contained in a section entitled "Protection of Surface Owner Rights." *Senate Report* 56. That section declares Congress's intent that "disputes about property rights which might arise" in situations where "the mineral and surface estate [have been] separated" should continue to be governed by "State laws" and that Congress "has no intention whatsoever * * * to change *such* rights." *Ibid.* (emphasis added). When viewed in context, the language upon which petitioner and its amici rely clearly does not address the wholly separate question of under what circumstances the SMCRA itself bars surface coal mining operations in situations where such mining would previously have been allowed under state law.[6]

Although petitioner is correct that Congress has used the phrase "valid existing rights" in numerous fed-

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[6] Amicus NCCL contends (at 13-15) that the approach to "valid existing rights" in the 1999 regulations displaces state law, and implies that, in so doing, the rule contradicts congressional intent. That argument is incorrect as well. The 1999 regulations' definition of "valid existing rights" expressly defers to state law on questions relating to the first part of the analysis, that is, whether "a legally binding conveyance, lease, deed, contract, or other document vests that person, or a predecessor in interest, with the right to conduct the type of surface coal mining operations intended." 30 C.F.R. 761.5(a).

eral statutes (see Pet. 6-8 & nn.1-16), petitioner errs in contending that that phrase has any "settled meaning" (Pet. 20) that applies regardless of the particular statutory context in which it is used or the expert determinations of an agency charged with administering it. So far as we are aware, Congress has never defined "valid existing rights" in any of the statutes in which it has used that phrase. See 64 Fed. Reg. at 70,794. In addition, petitioner cites no judicial decision (and we are aware of none) that holds that "valid existing rights" is a term of art that always includes the sort of property interests —coupled with an ability to mine (or engage in other activity) as a matter of state law—that petitioner contends the phrase "valid existing rights" as used in 30 U.S.C. 1272(e) was intended to protect.[7] See *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 n.8 (2004) (cautioning against "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of

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[7] The only lower-court decisions that petitioner cites regarding the meaning of "valid existing rights" are three Ninth Circuit decisions, one D.C. Circuit decision, a district court decision, and a decision by the Supreme Court of Alabama; those decisions are cited in a footnote contained in petitioner's Statement of the Case. See Pet. 8 n.16. Petitioner does not assert that the D.C. Circuit's decision in this case conflicts with any of those decisions, and none of them interpreted the words "valid existing rights" in the SMCRA.

Amicus NCCL errs in suggesting (at 7) that this Court's decision in *Wilbur* v. *United States ex rel. Krushnic*, 280 U.S. 306, 316-318 (1930), supports the view that "valid existing rights" has "a well-established purpose and meaning." The phrase "valid existing rights" does not appear in *Wilbur* at all, and it was *conceded* in that case that the particular claim at issue "was valid and existent when the" relevant statute had been enacted. *Id.* at 316.

them") (citation omitted); see also *Environmental Defense* v. *Duke Energy Corp.*, 127 S. Ct. 1423, 1432-1434 (2007) (holding that the Environmental Protection Agency had not exceeded the scope of its lawful authority in interpreting the same term in a single statute in different ways)

Petitioner's invocation of statutory structure (Pet. 23-24) does not warrant a different result. First, petitioner's argument is premised on a misreading of the 1999 regulations. The 1999 regulations do not "require miners to *obtain* [all] permits to *qualify* for [valid existing rights] in the first place." Pet. 24 (first emphasis added). To the contrary, OSM made clear, as it has since 1986, that a property owner need only have made a *good-faith effort* to obtain the necessary permits at the time the property became covered by Section 1272(e), and that that standard does not necessarily require the claimant even to have *submitted* all relevant permit applications. See 64 Fed. Reg. at 70,777 ("We do not interpret the good faith/all permits standard as requiring submission of applications for all necessary permits" before the land comes under the protection of Section 1272(e)). Petitioner's argument also ignores the fact that the 1999 regulations provide two other methods by which a claimant may establish "valid existing rights" —satisfaction of the needed-for-and-adjacent-to standard or satisfaction of the alternate for roads. See *id.* at 70,787, 70,790; note 3, *supra*. Accordingly, the fact that Congress "condition[ed other] exemptions * * * on the *attainment* of regulatory permits" (Pet. 24) (emphasis added), does not demonstrate that Congress intended to preclude OSM from identifying a good-faith *effort* to obtain such permits as one method by which a claimant may establish "valid existing rights" under 30 U.S.C.

1272(e). See 64 Fed. Reg. at 70,778 (stating "that the statute's use of different terminology for each of these exceptions means that Congress probably intended a somewhat different meaning for the [valid existing rights] exception under [30 U.S.C. 1272(e)] than for the exceptions provided under the other statutory provisions cited by the commenters").

Second, petitioner's argument is inconsistent with other structural features of the SMCRA. The overall purpose of 30 U.S.C. 1272(e) is to protect certain areas from the impacts of surface coal mining operations. See *Senate Report* 55 (stating that Congress included Section 1272(e) because it "made a judgment that certain lands simply should not be subject to new surface coal mining operations"). But if the phrase "valid existing rights" applies whenever a person had a property interest in coal in the ground and state law would not have prohibited the coal from being mined in the absence of Section 1272(e), as petitioner appears to suggest, then Section 1272(e) would have virtually no effect. See 64 Fed. Reg. at 70,772, 70,778, 70,784, 70,785, 70,826. In addition, petitioner's proposed interpretation of "valid existing rights" would mean that Section 1272(e) "would offer no significant protection * * * beyond that independently afforded by" 30 U.S.C. 1257(b)(9), which already requires that permit applicants have a property right in the coal to be mined. 64 Fed. Reg. at 70,785; accord *id.* at 70,826 (stating that the interpretation proposed by petitioner "would result in a finding of [valid existing rights] whenever a person met the permit application requirements for property rights," and thus render Section 1272(e)'s independent protections "meaningless").

2. Petitioner also contends (Pet. 26-33) that the D.C. Circuit erred in applying *Chevron* in this case because "OSM's statutory construction * * * will trigger takings claims." Pet. i. That contention does not merit further review.

a. This Court has made clear that "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property" provides "no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985) (*Riverside Bayview*); see *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n.40 (1981) (noting that "an alleged taking is not unconstitutional unless just compensation is unavailable."). The Court has explained that, "[u]nder such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty, [but merely] frustrates permissible applications of a statute or regulation." *Riverside Bayview*, 474 U.S. at 128 (citing *Ashwander* v. *TVA*, 297 U.S. 288, 341-356 (1936) (Brandeis, J., concurring)); accord *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005) (stating that the constitutional avoidance canon is "a means of giving effect to congressional intent, not of subverting it").

The Court stated in *Riverside Bayview* that a narrowing construction of a statute may be appropriate where there is "an identifiable class of cases" or an "identifiable set of instances" in which the mere "application of a statute [or regulation] will *necessarily consti-*

*tute a taking*." 474 U.S. at 128 n.5 (emphasis added).[8] In *Riverside Bayview*, the Court cited as an example the statute at issue in *United States* v. *Security Industrial Bank*, 459 U.S. 70 (1982), where there was a substantial argument that the retroactive application of a provision of the Bankruptcy Code "would *in every case* constitute a taking," and "the solution was to avoid that difficulty by construing the statute to apply only prospectively." *Riverside Bayview*, 474 U.S. at 128 n.5 (emphasis added). No such situation is present here. Moreover, because *Security Industrial Bank* involved purchase-money security interests obtained in transactions between private parties—a setting in which it is exceedingly unlikely that Congress would have intended for the United States to pay compensation if a taking was found—the Court in that case appears to "have assumed the lack of compensatory remedy" under the Tucker Act. *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion).

The court of appeals correctly held that this case falls into the general rule of *Riverside Bayview* rather than its exception. In the first place, here, unlike in the *Security Industrial Bank* example cited in *Riverside Bayview*, the court of appeals properly concluded that "the Tucker Act [would] provide[] * * * a remedy" in situations where application of the "valid existing rights" standard established in the 1999 regulations would result in a Fifth Amendment taking. Pet. App. 15a.[9] Nor has petitioner in any event demonstrated that

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[8] But see Pet. i (framing inquiry as whether the standard set forth in the 1999 regulations "will trigger takings *claims*") (emphasis added).

[9] Amicus NCCL asserts (at 16) that there are certain circumstances in which such a claim would have to be brought in state court rather than in the Court of Claims under the Tucker Act, 28 U.S.C. 1491(a).

application of the 1999 regulations will "*necessarily* constitute a taking" in any "identifiable class of cases." *Riverside Bayview*, 474 U.S. at 128 n.5 (emphasis added). As explained earlier, OSM employed the good faith/all permits standard between August 4, 1980, and September 14, 1983, and has been employing it continuously since November 20, 1986. See pp. 4-8, *supra*. OSM found that the United States and the States that employ the same standard have *never* been required to pay just compensation for a taking of property resulting from application of the good faith/all permits standard. See 64 Fed. Reg. at 70,823. The court of appeals also determined that petitioner had implicitly conceded at oral argument that the definition of "valid existing rights" contained in the 1999 regulations "will have relatively insignificant takings implications." Pet. App. 16a; see pp. 8-9, *supra*.

Petitioner repeatedly quotes (Pet. 4, 12, 31) a statement from the preamble to the 1999 regulations that the definition of "valid existing rights" "has significant takings implications." 64 Fed. Reg. at 70,781. Petitioner fails to mention, however, that the preamble makes clear that it is using the phrase "significant takings implications *as that term is defined by Executive Order 12630*," *ibid.* (emphasis added), for purposes of undertaking a "takings implication assessment," see *ibid.*; see Exec. Order 12,630, 3 C.F.R. 554 (1989). OSM performed an assessment under that definition in the preamble to the 1999 regulations, see 64 Fed. Reg. at 70,822-70,827, applying the *Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Un-*

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Regardless of whether that is so, the important point is that neither petitioner nor its amici deny that *some* court would always be available to hear such a circumstance-specific claim.

*anticipated Takings, id.* at 70,827. Petitioner also fails to note that the preamble states—two sentences after the "significant takings implications" language quoted by petitioner—that OSM "anticipate[s] that" the definition of valid existing rights in the 1999 regulations "will result in *very few compensable takings*." *Id.* at 70,781 (emphasis added); see *Riverside Bayview*, 474 U.S. at 128 n.5 (framing inquiry as whether application of a statutory or regulatory standard will actually "constitute a taking" in "an identifiable class of cases").

Takings claims based on adverse "valid existing rights" determinations under the standard set forth in the 1999 regulations might fail for a wide variety of reasons. Such a claim failed in *Stearns Co.*, v. *United States*, 396 F.3d 1354 (Fed. Cir.), cert. denied, 546 U.S. 875 (2005), for example, because the plaintiff had not sought a compatibility finding under 30 U.S.C. 1272(e)(2), which could have allowed it to mine even absent a determination of "valid existing rights." Other exemptions in Section 1272(e) might similarly allow access to coal even absent a determination of "valid existing rights." See 64 Fed. Reg. at 70,824. A takings claim based on an adverse "valid existing rights" determination could also fail if the plaintiff lacked a compensable property interest in the coal or was able to make alternate uses of the property, see *id.* at 70,823-70,825, or if the restriction on mining did not have the sort of economic impact that would result in a taking, see *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987). Particularly given the dearth of decisions requiring the government to pay compensation based on adverse "valid existing rights" determinations in all the years that standard has been in effect, the court of appeals correctly declined to frustrate permissible applica-

tions of the 1999 regulations based on the speculative possibility that takings might arise in the future.

Nor is petitioner correct that the D.C. Circuit has rendered the exception noted in *Riverside Bayfield* "a dead letter." Pet. 31. As the court of appeals noted in its decision (see Pet. App. 16a), the D.C. Circuit applied that exception in *Bell Atlantic Telephone Cos.* v. *FCC*, 24 F.3d 1441, 1445 (1994), and its decision in this case announced no plans to change course in the future. Instead, the court of appeals simply determined that this case was governed by the general rule that "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions." *Riverside Bayview*, 474 U.S. at 128. That case-specific determination was entirely correct and does not merit further review.

b. Although petitioner suggests that the lower courts "[a]re [c]onfused [a]bout" (Pet. 27) the proper application of the exception to the general rule stated in *Riverside Bayview*, it pointedly does not assert that the court of appeals' decision in this case conflicts with any of the decisions cited on pages 27 to 30 of the petition for a writ of certiorari. To the contrary, petitioner acknowledges (Pet. 27-29) that the Fifth, Eighth, and Federal Circuit decisions that it cites all *rejected* arguments that the prospect of takings claims required the courts to disregard standard *Chevron* principles and apply a narrowing construction.

Petitioner is therefore left to suggest (Pet. 29-30) that the D.C. Circuit's decision in this case may be in tension with that court's own previous decisions. But this Court has made clear that it is the province of each court of appeals to ensure consistency with, and resolve

conflicts among, its own decisions. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In addition, the unanimous panel opinion in this case discussed the decision that petitioner describes (Pet. 30) as having given "fullest exposition of the *Riverside Bayview Homes* rule." See Pet. App. 16a (discussing *Bell Atl. Tel. Cos.*, *supra*). It is also telling that, notwithstanding petitioner's contention that the panel's decision in this case constitutes "a sharp—but unexplained—break with its own precedent" (Pet. 31), no member of the D.C. Circuit voted to grant petitioner's petition for rehearing en banc.

3. Petitioner and its amici also fail to demonstrate that the D.C. Circuit's decision in this case will have "grave" or "far-reaching implications" (Pet. 34) either in the particular context of the SMCRA or more generally. As for the former: The Department of the Interior has applied the good faith/all permits standard for 25 of the 31 years since the SMCRA was enacted and has done so continuously since 1986. See pp. 4-8, *supra*. In addition, the preamble to the 1999 regulations explains that "[t]wenty of the 24 States with approved regulatory programs * * * already rely upon a good faith/all permits or all permits standard for" determining the existence of "valid existing rights." 64 Fed. Reg. at 70,767. Accordingly, to the extent that the words "valid existing rights" in Section 1272(e) have any "settled meaning" upon which "property owners [could] have relied," Pet. 20, the good faith/all permits standard would be that meaning.

Nor have petitioner or its amici demonstrated that the definition of "valid existing rights" in the 1999 regulations will have significant consequences with respect to other statutes. This Court has rejected the proposi-

tion that a single agency must always interpret the same term even within a single statute in precisely the same manner. See *Environmental Defense*, 127 S. Ct. at 1432-1434. It follows *a fortiori* that there is no requirement that the words "valid existing rights" must be interpreted in precisely the same way in "well over 100 federal statutes and proclamations" (Pet. 6) that were enacted and made over the course of a century, particularly in light of the fact that Congress does not appear to have defined that phrase in any of them. See 64 Fed. Reg. at 70,794 (stating that OSM "found no definitions of [valid existing rights] in other Federal statutes").

There is no indication that the Department of the Interior intends to apply the definition of "valid existing rights" that the 1999 regulations adopt with respect to the SMCRA to other statutes it administers.[10] To the

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[10] Amicus API expresses concern (at 8-10, 13-20) that the 1999 regulations could establish a precedent with respect to the oil and gas industry. API did not comment on the 1999 regulations while OSM was considering the matter, nor did it raise its concerns before the district court or the court of appeals. In addition, API's assertion (at 23) that a 1998 opinion by the Solicitor of the Interior regarding the meaning of "valid existing rights" in the Wilderness Act, 16 U.S.C. 1131 *et seq.*, "diverges 180 degrees" from the approach taken in the regulation currently before this Court was not presented either to the agency or the lower courts. And, at any rate, the fact that Interior interpreted a similar phrase in a different statute in a different manner simply underscores, as Interior observed in the preamble to the 1999 regulations, that SMCRA "is not analogous" to other statutes. 64 Fed. Reg. at 70,794.

contrary, the preamble to the 1999 regulations concludes that the interpretations of "valid existing rights" under other federal statutes did not "provide[] useful guidance" in this context because "[v]alid existing rights under [30 U.S.C. 1272(e)] is not analogous to [voluntary existing rights] under other Federal statutes." 64 Fed. Reg. at 70,794.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2008

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* The Solicitor General is recused from this case.

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No. 08-63

IN THE
# Supreme Court of the United States

NATIONAL MINING ASSOCIATION,
*Petitioner,*

v.

DIRK KEMPTHORNE, Secretary of the Interior, *et al.*,
*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## RESPONDENT KENTUCKY RESOURCES COUNCIL, INC.'S BRIEF IN OPPOSITION

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October 2008

## QUESTIONS PRESENTED

1. Did the D.C. Circuit correctly hold that the term "valid existing rights" in the Surface Mining Control and Reclamation Act (SMCRA) is ambiguous?

2. Did the D.C. Circuit correctly conclude that the agency's interpretation of "valid existing rights" does not create an identifiable class of cases in which application of SMCRA will necessarily constitute a taking?

## CORPORATE DISCLOSURE STATEMENT

Respondent Kentucky Resources Council, Inc., has no parent company and no publicly held company owns ten percent or more of its stock.

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## INTRODUCTION

In the decision below, the D.C. Circuit held that the term "valid existing rights" (VER) in the Surface Mining Control and Reclamation Act is ambiguous and deferred to the Secretary of the Interior's reasonable interpretation. Petitioner National Mining Association (NMA) objects to that interpretation and contends that the term should be interpreted more favorably to the coal industry's interests. But a court of appeals does not err every time it defers to an expert agency's interpretation that the regulated industry dislikes. Despite NMA's attempts to paint the D.C. Circuit's decision as unprecedented and extreme, the court conducted a standard *Chevron* analysis, correctly held that VER is ambiguous, and appropriately deferred to the Secretary's interpretation. And despite NMA's claims of a conflict, there is neither confusion nor a circuit split over how to apply *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), and the court of appeals correctly concluded that constitutional avoidance principles do not require rejection of the Secretary's construction. The lower court's decision is unremarkable and correct, and the petition for a writ of certiorari should be denied.

## STATEMENT OF THE CASE

### A. Factual Background

The Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (Aug. 3, 1977) (*codified at* 30 U.S.C. §§ 1201 *et seq.*), is a "comprehensive statute designed to 'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'" *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268 (1981) (quoting 30 U.S.C. § 1202(a)). Section 552(e) of SMCRA seeks to accomplish this purpose by

prohibiting most surface mining in or near America's parks, backyards, schoolyards, and graveyards. Specifically, it prohibits surface mining operations, with some exceptions, within the boundaries of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, National Recreation Areas, and any national forest; when it will adversely affect any publicly owned park or historic site; within one hundred feet of a public road or cemetery; and within three hundred feet of an occupied dwelling, a public, community, or institutional building, a school, a church, or a public park. 30 U.S.C. § 1272(e). The prohibitions of § 522(e) do not apply to surface mining operations pre-dating SMCRA and are subject to "valid existing rights" (VER), a term that the statute does not define. *Id.*

SMCRA authorizes the Secretary of the Interior, acting through the Office of Surface Mining Reclamation and Enforcement (OSM), to promulgate regulations to implement the Act. 30 U.S.C. § 1211(c)(2). Accordingly, on December 17, 1999, after engaging in notice-and-comment rule-making procedures, OSM published a final rule defining VER for purposes of § 552(e). *See* 64 Fed. Reg. 70766 (Dec. 17, 1999). Under the rule, a person can demonstrate VER by showing that a legally binding document vests that person with the right to conduct the intended type of surface mining operation and that either 1) all permits required to conduct the mining had been obtained or a good-faith effort had been made to obtain them before the land came under the protection of § 552(e) (known as the "good faith/all permits" standard); or 2) the

land is needed for and immediately adjacent to a surface coal-mining operation for which all permits had been obtained or a good-faith attempt to obtain them had been made before the land came under the protection of § 552(e) (known as the "needed for and adjacent" standard). *See id.* at 70831. Versions of the "good faith/all permits" and "needed for and adjacent" standards adopted in the final rule have been in use for most of the time since 1980, when the U.S. District Court for the District of Columbia remanded an earlier regulation to the agency, stating that "a good faith attempt to have obtained all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test." *Id.* at 70770 (quoting *In re Permanent Surface Mining Regulation Litigation I*, 14 Env't Rep. Cas. (BNA) 1083, 1091 (D.D.C., Feb. 26, 1980)); *see also id.* at 70782 ("[W]e have used the good faith/all permits standard most of the time since SMCRA's enactment."); Pet App. 34a ("The 'good faith/all permits' rule previously has been applied as the federal standard, having been implemented in 1980 and 1986 at the direction of OSM and in the early 1990s at the direction of Congress.").

The 72-page preamble to the final rule described in detail the context in which VER appears in SMCRA; the legislative history of the VER provision in § 522; the regulatory history of OSM's efforts to define VER; the alternative definitions for VER that OSM considered; why OSM rejected those alternative standards; and how OSM's definition compares with the definition of VER under other federal statutes. *See* 64 Fed. Reg. 70766. The preamble explained that OSM chose the "good faith/all permits" standard because it believed that standard "best achieves

protection of the lands listed in section 522(e) in a manner consistent with congressional intent at the time of SMCRA's enactment," while also protecting "the interests of those persons who had taken concrete steps to obtain regulatory approval for surface coal mining operations on lands listed in section 522(e)" before those lands came under § 522(e)'s protection. *Id.* at 70776. It pointed out that the "good faith/all permits" standard was consistent with the Act's legislative history, and that "20 of the 24 approved State regulatory programs under SMCRA already rely upon either the good faith/all permits standard or the all permits standard," so "adoption of a good faith/all permits standard would cause the least disruption to existing State regulatory programs." *Id.*

With regard to the rule's takings implications, the agency noted that insufficient information was available to assess the rule's takings consequences accurately and that, therefore, the rule had "significant takings implications" under Executive Order 12630, which requires agencies to identify the takings implications of proposed actions. *See id.* at 70827, 70781. It explained, however, that it "anticipate[d] that the rule will result in very few compensable takings." *Id.* at 70781.

**B. Proceedings Below**

NMA challenged the final rule. After describing in detail both the regulatory history of the VER definition and OSM's rule-making process, the district court granted summary judgment to the Secretary, applying the two-step test in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, noting that courts "employ 'traditional tools of statutory construction'" in

determining whether Congress has spoken to the precise issue under *Chevron* step one, Pet. App. 30a (citation omitted), the court held that the final rule was not contrary to congressional intent. *Id.* at 32a. Then, pointing out that the agency had considered all relevant factors and articulated a satisfactory explanation for its decision, it held that the final rule was a permissible construction of the statute. *Id.*

The court of appeals affirmed in a unanimous opinion by Judge Griffith. With regard to *Chevron* step one, the court explained that the question was "whether Congress has delegated authority to an agency by leaving a statutory gap for the agency to fill." *Id.* at 7a. The court answered that question in the affirmative, noting that it had earlier "determined that the phrase [VER] is subject to multiple and divergent meanings." *Id.* at 8a (citing *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 748-51 (D.C. Cir. 1988) and pointing out that the court in that case had noted "the ambiguity inherent in VER" and deferred to "the Secretary's reasonable interpretation of the phrase"). The court explained that its "reading of the SMCRA's language" convinced it "that VER is an ambiguous phrase," and that it had previously concluded, in *National Wildlife Federation*, "that the legislative history of the SMCRA does not illuminate the meaning of VER." *Id.* at 7a-8a (citing *Nat'l Wildlife Fed'n*, 839 F.2d at 749).

The court then responded to NMA's argument that the plain meaning of VER did not allow for the agency's interpretation of the phrase. Using the same dictionary NMA had cited, the court explained that the word "rights" could mean property rights, as NMA claimed, but that it could also mean rights more generally. The court found it

hard to conclude that Congress had directly spoken to the precise question at issue "by using a word with multiple and often vague meanings." *Id.* at 9a. Similarly, the court pointed out that the word "valid" injected further ambiguity into the statute "because it requires yet another question: Under law, what makes a miner's rights sufficient?" *Id.* Accordingly, the court concluded that the "dictionary counsels in favor of more deference to the agency, not less." *Id.* (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005); *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992); *AFL-CIO v. FEC*, 333 F.3d 168, 174 (D.C. Cir. 2003)).

The court then stated that nothing in § 522(e) suggested that Congress meant VER to mean valid existing property rights, rather than a narrower interpretation of the phrase. It pointed out that Congress did not use the more precise term "valid existing property rights," instead of the ambiguous term "valid existing rights." Citing cases in which courts deferred to various agency interpretations of VER under other statutes, and noting that academics could not reach consensus on VER's meaning in SMCRA, the court concluded that if "VER operates as a 'term of art,' as the NMA suggests, it is as a tool by which Congress delegates policymaking authority through ambiguity." *Id.* at 10a.

Having found VER ambiguous, the court turned to *Chevron* step two. The court pointed out that the agency had thoroughly considered the issue, that it had demonstrated that its interpretation was consistent with the statute, and that the rule was true to the statute's primary purpose of protecting against the harmful effects

of surface mining. The court therefore determined that the agency's interpretation of VER was reasonable.

Finally, the court addressed NMA's argument that it should not apply *Chevron* deference because of constitutional avoidance principles. The court explained that although "constitutional avoidance trumps *Chevron* deference," courts "do not abandon *Chevron* deference at the mere mention of a possible constitutional problem." *Id.* at 14a. With regard to NMA's argument that *Chevron* deference was not applicable because the rule would work a taking, the court, following this Court's holding in *Riverside Bayview Homes*, 474 U.S. at 127-28, pointed out that a taking is unconstitutional only if the government does not pay compensation, but that the Tucker Act provides for compensation. "Given this protection," the court explained, "the NMA's takings challenge raises no serious question about the 1999 Rule that would preclude *Chevron* deference." Pet. App. 15a.

The court did recognize that there are times when application of constitutional avoidance principles is appropriate under the Takings Clause. Specifically, it recognized that avoidance principles come into play when "a statute creates 'an identifiable class of cases in which application of [the] statute will necessarily constitute a taking.'" *Id.* at 15a-16a (quoting *Riverside Bayview Homes*, 474 U.S. at 128 n.4 (1985)). However, the court noted, NMA had "shown no 'identifiable class' of miners whose takings claims would expose the Treasury to such liability." *Id.* at 16a. The court further pointed out that NMA had not claimed that the government would be on the hook for massive, unforseen sums due to the rule, and that the record was "devoid of evidence suggesting it is

so." *Id.* "Given this implicit concession that the 1999 rule will have relatively insignificant takings implications that can readily be addressed in the Court of [Federal] Claims," the court determined that there was "no serious constitutional problem to be avoided." *Id.* It concluded that the usual *Chevron* analysis applied and deferred to the Secretary's reasonable interpretation of VER.

NMA filed a petition for rehearing and rehearing en banc, which was denied without any member of the court of appeals requesting a vote. *Id.* at 37a-38a.

## REASONS FOR DENYING THE WRIT

### I. The D.C. Circuit Properly Applied *Chevron*.

NMA's primary argument for why the Court should review its policy disagreement with OSM is that, in NMA's view, the court of appeals announced "a new rule" that a "statutory phrase is categorically ambiguous if just one word in that phrase . . . has multiple dictionary definitions." Pet. at i. The court of appeals did no such thing.

Contrary to NMA's claims, the court of appeals did not just rely on the dictionary definition of the word "rights" in determining that VER is ambiguous. The court also looked to its own previous case law on the term, noted that the legislative history was unhelpful, discussed the ambiguity of the word "valid," indicated that it had given thought to all of the language in § 552(e), pointed out that the academy could not reach consensus on the meaning of VER, and cited other cases in which courts had looked to agency interpretations of VER. Pet. App. 7a-11a. In short, NMA's assertion that the D.C. Circuit based its entire analysis on the dictionary definitions of the word

"rights" is simply not true. *Contrast, e.g.*, Pet. at 13 (stating that the court of appeals "ignor[ed]" the words "valid" and "existing") *with* Pet. App. 9a (discussing the ambiguity of the word "valid"). Thus, NMA's first "question presented"—whether "a statutory phrase is necessarily ambiguous and triggers *Chevron* deference because a single word within that phrase is itself ambiguous"—is not properly presented.[1]

To be sure, the court of appeals did not say it was going to examine text, structure, purpose, and context, and then proceed to categorize each of its points into one of those categories. But this Court has never required such a mechanical application of the tools of statutory interpretation. Nor has it required courts to discuss every tool or canon of statutory construction, whether or not they would affect the holding in the case. That the D.C. Circuit decided not to address certain of NMA's arguments in its opinion does not mean that it categorically held that those sorts of arguments are irrelevant. *See* Pet. at 24 (claiming that, by not specifically addressing a particular structural

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[1]NMA's repeated claim that the D.C. Circuit deferred to the agency about whether or not the term VER is ambiguous is equally fictitious. *See* Pet. at 3, 15, 25. The D.C. Circuit did not purport to defer to the agency in determining VER's ambiguity; indeed, in its discussion of *Chevron* step one, it never even mentioned that the agency found the word ambiguous. Pet. App. 7a-11a. NMA's insistence that the court of appeals deferred to the agency's view on VER's ambiguity seems to stem from its unexplained belief that "focus[ing] exclusively on abstract definitional possibilities" is equivalent to deferring to the agency on the issue of ambiguity. Pet. at 15. But even if the D.C. Circuit had based its holding solely on the fact that the word "rights" is capable of many dictionary definitions (which it did not), deference to the dictionary is not the same as deference to the agency.

argument, the court of appeals "effectively announc[ed] that a statute's structure need not be consulted to interpret it"). It just demonstrates that the D.C. Circuit disagreed with NMA about whether those particular arguments were telling in this case.

NMA similarly attributes to the D.C. Circuit a categorical rule of NMA's own invention in claiming that the court of appeals held that "the more Congress uses a term, the less settled its meaning becomes." Pet. 20-21. The D.C. Circuit did not hold that *all* terms of art are means by which Congress delegates policy-making authority. Rather, it noted, based on its reading of VER cases, that *this particular* term of art (if it is a term of art at all) demonstrates Congress' intent to delegate authority to the agency because the term has been subject to agency interpretation when used in various other statutes. In doing so, the D.C. Circuit followed the exact presumption NMA claims (at 21) it inverted: It assumed that the term VER means the same thing across statutes, specifically that Congress intended to delegate authority to the agency. Pet. App. 10a-11a. But the D.C. Circuit did not say that all terms of art have this same policy-delegation meaning, and NMA's Chicken Little claims about the "serious mischief" that will follow from the decision below are misplaced. Pet. at 23.

In short, despite NMA's best attempts to find a "novel" and "troubling" categorical rule in the D.C. Circuit's opinion that would justify this Court's attention, Pet. at 25, the court below conducted an unremarkable *Chevron* analysis. Indeed, that the opinion below did not introduce a "newly minted rule of decision," Pet. at 25, is clear from the fact that, following its decision in this case, the D.C.

Circuit has continued applying traditional tools of statutory construction in determining whether statutory provisions are ambiguous. *See Natural Res. Def. Council v. EPA*, 529 F.3d 1077, 1081-83 (D.C. Cir. 2008) (looking at text, legislative history, and other provisions of statute in determining that Congress drafted provision to be ambiguous); *HolRail, LLC v. Surface Transp. Bd.*, 515 F.3d 1313, 1316 (D.C. Cir. 2008) (explaining that under *Chevron* step one the court employs "'traditional tools of statutory construction' to determine 'whether Congress has directly spoken to the precise question at issue'") (citing *Chevron*, 467 U.S. at 842, 843 n.9)). In other words, the court of appeals' decision did not usher in a new mode of interpretation in the D.C. Circuit. Although the court of appeals did not reach the conclusion NMA would have liked, its analysis was appropriate and does not require this Court's review.

## II. There Is No Confusion or Circuit Split Over *Riverside Bayview Homes*.

The D.C. Circuit's application of *Riverside Bayview Homes*, 474 U.S. 121, likewise does not warrant review. There is neither confusion nor a circuit split over when the takings implications of an agency's construction of a statute warrant deviation from the usual *Chevron* analysis, and the D.C. Circuit correctly concluded that the canon of constitutional avoidance is not implicated here.

1. In *Riverside Bayview Homes*, this Court considered whether takings issues justify narrowly construing a statute and held that "if compensation will . . . be available in those cases where a taking has occurred," constitutional avoidance principles generally are not implicated and a

narrowing construction is not required. 474 U.S. at 128. "Under such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty[;] it merely frustrates permissible applications of a statute or regulation." *Id.*

In a footnote, the Court suggested a limited exception to its holding that takings issues do not implicate constitutional avoidance principles and require a narrowing construction when compensation is available under the Tucker Act: Distinguishing a prior holding, the Court said that it would be "sensible" to construe a statute narrowly where "there is an identifiable class of cases in which application of a statute will *necessarily* constitute a taking." *Id.* at 128 n.5 (emphasis added).

NMA claims that there is "confusion" and "a rift among the circuit courts," Pet. at 33, 4, over the application of *Riverview Bayview Homes*. But the only evidence it cites of this purported confusion is that three circuits have followed *Riverside Bayview Homes* in declining to adopt narrowing statutory constructions to avoid takings issues "in the particular factual contexts in which [the case] has been invoked," Pet. at 29, while the D.C. Circuit, considering different facts, "has applied the [exception in the footnote] on multiple occasions and even enforced it." *Id.* (citing one case in which the D.C. Circuit relied on the exception to narrowly construe a statute, four cases in which the court noted the exception but found it inapplicable under the circumstances before it, and one case in which the court found an agency's interpretation unreasonable without relying on constitutional avoidance

principles or mentioning *Riverside Bayview Homes*).[2] That the application of *Riverside Bayview Homes* can lead to different results when applied to different facts does not demonstrate any confusion among the lower courts about the case, let alone that the courts "have long struggled to understand and apply" it. Pet. at 4. Rather, the cases cited reflect broad agreement among the circuits with the case's principal holding that narrowing constructions are generally not warranted to avoid takings issues absent unusual circumstances.

2. The circuit split that NMA claims was caused by the D.C. Circuit's decision in this case is similarly elusive. NMA claims that the decision below conflicts with the precedent of all "the other Circuits that have recognized the validity" of *Riverside Bayview Homes*. Pet. at 31. But as described by NMA itself, the holdings of the other circuits that NMA claims have "struggled" with the meaning of *Riverside Bayview Homes* are entirely consistent with the result and the reasoning of the decision below. Like those courts, the court below recognized the validity of *Riverside Bayview Homes*. And like those courts, the court below determined that *Riverside Bayview Homes* did not warrant narrowly construing the statute at issue. Indeed, NMA cites no decision from any other circuit that has applied *Riverside Bayview Homes* to give a narrow construction to a statute to avoid takings concerns. It is difficult to see where the conflict lies.

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[2]In the cases from other circuits cited by NMA, two (from the Eighth and Federal Circuits) did not even cite the footnote, while one (from the Fifth Circuit) cited the footnote but held it inapplicable under the circumstances.

NMA's assertion that the decision below created a conflict seems to rest principally on its contention that the D.C. Circuit's decision departs from its *own* prior precedent applying the *Riverside Bayview Homes* footnote. Such a purported intra-circuit is generally not a basis for granting certiorari, particularly where, as here, the lower court has *unanimously* denied rehearing en banc, indicating that no judge on the court saw the decision as a departure from circuit precedent. Moreover, the court in this case not only specifically cited the *Riverside Bayview Homes* footnote, *see* Pet. App. 15a-16a, but also acknowledged and distinguished its one precedent applying the footnote to narrowly construe a statute in circumstances (unlike the circumstances in this case) where a broader construction necessarily involved takings in an identifiable category of cases. *See id.* at 16a (citing *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994)). And that case, which involved a physical taking, *itself* distinguished cases involving allegations of regulatory takings (such as this case) explaining that because regulatory takings are judged under "the factually sensitive standards of *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978)," the "'identifiable class' principle" was inapplicable. *Bell Atl. Tel. Cos.*, 24 F.3d at 1446. In light of the court's careful treatment of its precedent, and *Bell Atlantic*'s own distinction of regulatory takings cases, NMA's assertion that the *Riverside Bayview Homes* footnote is now a "dead letter in the D.C. Circuit," Pet. at 4, is untenable. On the contrary, it remains true that the D.C. Circuit is the only circuit that has ever applied the footnote to support a narrow construction of a statute, and the decision below

expressly recognizes the continued vitality of the case in which it did so.[3]

Ultimately, NMA's argument rests not on conflict among the circuits, but on NMA's view that "it is hard to imagine the circumstances in which the [exception] *would* apply" if it does not apply here. Pet. at 4 (emphasis in original). In other words, despite NMA's claims of confusion and a circuit split, its argument about *Riverside Bayview Homes* ultimately boils down to the assertion that the D.C. Circuit was wrong in determining that there was no identifiable class of mining companies who would necessarily have takings claims, thereby "misappl[ying]... a properly stated rule of law." S. Ct. R. 10. Even if that assertion were correct, it would hardly justify granting a writ of certiorari.

3. In any event, the D.C. Circuit did not misapply the *Riverside Bayview Homes* footnote. According to NMA, the D.C. Circuit erred because OSM itself said that the "good faith/all permits standard" would create an identifiable class of takings cases and because it is easy to

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[3]NMA also attempts to manufacture a conflict between the decision below and *Riverside Bayview Homes* by contending that the footnote only requires it to have a "substantial argument" that the rule would cause takings, while the D.C. Circuit required it to present "evidence." Pet. at 31-32. What the footnote specifically says, however, is that a narrow construction is sensible "where it appears that there is an identifiable class of cases in which application of a statute will necessarily constitute a taking." 474 U.S. at 128 n.5. And what the D.C. Circuit concluded was that "NMA has shown no 'identifiable class' of miners whose takings claims would expose the treasury to such liability," Pet. App. 16a, *i.e.*, that there did not appear to be such an identifiable class. Once again, the conflict is difficult to discern.

discern what that class would be. Pet. at 31-32. NMA is wrong on both accounts.

First, although NMA is correct that OSM acknowledged that the final rule "is expected to have a greater *potential* for takings implications than the other alternatives considered," 64 Fed. Reg. at 70787 (emphasis added), NMA ignores OSM's conclusion about takings under the final rule: that although the agency anticipated that the rule would result in "very few" takings, *id.* at 70781, "insufficient information is available to enable an accurate assessment of the extent to which significant takings consequences might result from adoption and application of this rule." *Id.* at 70787. NMA repeats like a mantra that OSM stated the final rule would have "significant takings implications," but what OSM specifically stated was that the rule would have "significant takings implications *as that term is defined by Executive Order 12630.*" *Id.* at 70781 (emphasis added). The relevant definition is found in the *Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings* (June 30, 1988) (reprinted in 18 Envtl. L. Rep. 35168 (1988)), under which an action is deemed to have significant takings implications if "the proposed policy or action poses a substantial risk that a taking of private property may result" or if "[i]nsufficient information as to facts or law exists to enable an accurate assessment of whether significant takings consequences may result from the proposed policy or action." *Id.* at 35170. OSM concluded that the rule had significant takings implications under the *second* of these two definitions. *See* 64 Fed. Reg. at 70827. In other words, it concluded that it did not know what the takings implications would be.

Even if OSM had found significant takings implications under the colloquial use of that term, however, that would not mean that there was an *identifiable* class for whom application of the rule would *necessarily* constitute a taking. No such class exists here. *See Penn Cent.*, 438 U.S. at 124 (explaining that determining whether a regulation constitutes a taking involves "essentially ad hoc, factual inquiries"); *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295 (in rejecting facial challenge to § 552(e), noting that "these 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances"). Contrary to NMA's contention, "miners with valid property rights to surface mine coal estates in a protected area who did not secure (or make a good effort to secure) all permits or authorizations before the area came under SMCRA's protections," Pet. at 31-32, do not constitute such a class.

In the preamble to the final rule, OSM provided multiple reasons why such miners might not have takings claims. For example, it noted that "if VER for surface mining were denied, but underground mining were possible and economical, we expect that a takings claim would be difficult to sustain." 64 Fed. Reg. at 70824. Similarly, miners may not have takings claims if they are able to access the coal through "compatibility findings, waivers and joint approvals authorized under paragraphs (e)(2) through (e)(4) of section 522 [or through the] outright purchase of a protected feature such as an occupied dwelling to remove it from protected status." *Id.* And if the "holder determines that the coal is not

economically minable" or if the "holder of coal rights purchased those rights after the land came under the protections of section 522(e)" and was therefore "on notice of the applicability of the prohibitions in section 522(e)," the owner might not have reasonable investment-backed expectations. *Id.* Overall, OSM noted that it was "aware of no final decisions in which the U.S. Court of Federal Claims has held that a person who could not meet the good faith/all permits standard suffered a compensable taking." *Id.* at 70782. And courts have repeatedly rejected takings claims based on surface coal mining prohibitions in specific areas, demonstrating that such bans do not, in fact, necessarily constitute takings. *See, e.g., Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1362 (Fed. Cir. 2001) (denying takings claim where plaintiff lacked reasonable investment-backed expectation); *Appolo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 736 (2002) (denying takings claim where plaintiff lacked reasonable investment-backed expectation, the mining ban abated a nuisance, and plaintiff could mine outside the prohibited area); *Dep't of Natural Res. v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000 (Ind. 1989) (denying takings claim based on prohibition on surface mining in archaeologically significant area). In short, there is no identifiable class of miners for whom the final rule will necessarily constitute a taking as required for a narrowing construction under the *Riverside Bayview Homes* footnote, and the D.C. Circuit was therefore correct to apply a normal *Chevron* analysis.

## III. The Decision Below Is Correct

Not surprisingly, given that it applied the correct analysis, the D.C. Circuit also reached the correct result:

VER is ambiguous and the Secretary's reasonable interpretation is deserving of deference.

As the court of appeals noted, the words "valid existing rights" can bear multiple meanings. The legislative history does not clarify the issue. And neither SMCRA's purpose, nor its structure, nor the context in which the term VER appears gives VER the plain meaning NMA wants it to have.[4] To the contrary, the Secretary's interpretation best furthers SMCRA's goal of "minimiz[ing] so far as practicable the adverse social, economic, and environmental effects of [surface coal] mining operations." 30 U.S.C. § 1201(e).

Accordingly, NMA's primary argument why VER is not ambiguous rests not on the analysis of any of these factors, but on the fact that, in its view, VER is a term of art the meaning of which is consistent across statutes. But, as OSM explained in the preamble to the final rule, the interpretation of VER in other statutory contexts does not provide useful guidance because "SMCRA has a fundamentally different nature" from the federal public land laws that use the term VER. 64 Fed. Reg. at 70794. "Unlike those laws, SMCRA regulates the use of non-Federal lands." *Id.* And, unlike those laws, whose VER clauses "typically relate to when a person may complete an already initiated process to obtain a property interest in public lands if there is a change in the laws or other requirements governing the vesting or perfecting of

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[4]NMA's structural arguments (at 24-25) are inapposite. NMA contends that other SMCRA provisions demonstrate that Congress did not intend to require miners to obtain permits to qualify for VER, but the rule at issue does not so require.

interests in those lands," "the VER exception in section 522(e) of SMCRA concerns a person's eligibility to obtain a permit to conduct surface coal mining operations when vested property rights already exist." *Id.* at 70793, 70794. In any event, courts have found VER ambiguous in other statutory contexts as well. *See, e.g., Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1341-42 (9th Cir. 1990) (giving *Chevron* deference to Secretary's interpretation of VER in Alaska Native Claims Settlement Act); *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1236 (D. Utah 2000) (noting that VER may "constitute a latent ambiguity in the statute"); *cf. Getty Oil Co. v. Clark*, 614 F. Supp. 904, 921 (D. Wyo. 1985) ("[T]he proper construction of the term 'valid existing rights' [in the Wyoming Wilderness Act of 1983] is far from clear under applicable precedent.... The Department of the Interior must pass upon this issue in the first instance ....").

As NMA notes (at 10), this Court stated in *Hodel v. Virginia Surface Mining & Reclamation Ass'n* that an all-permits test for VER "is not compelled by either [SMCRA's] statutory language or its legislative history." 452 U.S. at 297 n.37. Indeed, the statutory language and legislative history of SMCRA do not compel *any* specific interpretation of VER. The term is ambiguous, and, despite NMA's dislike for the Secretary's interpretation, the court of appeals was correct to defer to it.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

NATIONAL MINING ASSOCIATION,
*Petitioner*,

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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IN THE

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NATIONAL MINING ASSOCIATION,

*Petitioner*,

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, *et al.*,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF FOR PETITIONER[1]

1. The briefs in opposition acknowledge that Congress has repeatedly—over a hundred times in the course of over a hundred years—enacted land restrictions and regulations that are subject to "valid existing rights" ("VER"). The briefs in opposition also recognize that these statutes encompass a wide spectrum of land-use restrictions and requirements enforced by numerous federal agencies, from the Department of the Interior's Bureau of Land Management and Office of Surface Mining Reclamation and Enforcement ("OSM") to the Department of Agriculture's Forest Service. Yet respondents maintain that the D.C. Circuit's

[1] Petitioner's Rule 29.6 Statement appears at Pet. ii.

holding—that Congress in repeatedly employing the phrase "valid existing rights" in those many statutes intended to confer on each responsible agency essentially unreviewable interpretive authority to declare what the term means—is just *Chevron* interpretation as usual.

It is not. The D.C. Circuit's decision upended the established understanding of how courts interpret statutes, establishing a broad new *Chevron* precedent for future use in similar circumstances. The court found the term "valid existing rights" to be categorically ambiguous because the dictionary sometimes defines the word "right" to be a property right and sometimes does not. Thus, according to the D.C. Circuit, when Congress used the established phrase in SMCRA,[2] it must have intended to imbue OSM with broad authority to define and interpret the term to suit its own purposes. That overly accommodating treatment of agency interpretation, as we explained in the petition, effectively makes every case a *Chevron* step two case.

The D.C. Circuit's unorthodox approach to statutory interpretation conflicts with this Court's decisions and warrants review. This Court's precedents have never permitted statutory interpretation to turn on whether close textual review of a single word reveals multiple abstract definitional possibilities—and thus "ambiguity." Courts rather are instructed to apply the familiar, established tools of statutory construction in discerning a statute's meaning. *See Regions Hosp.* v. *Shalala*, 522 U.S. 448, 457 (1998) ("If, by 'employing

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[2] *Surface Mining Control and Reclamation Act of 1977*, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201 *et seq.*).

traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter.' ") (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *see also Brown* v. *Gardner*, 513 U.S. 115, 118-120 (1994) (rejecting agency definition of "injury" based on statutory context and structure, while acknowledging that agency had relied on common usage of the term); *see* Pet. 16-20. Only if a statute remains ambiguous *after* examining its structure, context, and purpose may a court defer to an agency's interpretation (so long as it is reasonable). *See, e.g., National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007); *Dolan* v. *United States Postal Serv.*, 546 U.S. 481 (2006). Any standard looser than this rigorous two-step analysis would raise a serious separation-of-powers problem; for it would empower Executive Branch agencies to rewrite—if not repudiate—otherwise clear congressional mandates. *See United States* v. *Mead Corp.* 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (*Chevron* doctrine is "rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches.").

2. The briefs in opposition implicitly acknowledge the conflict between the D.C. Circuit's interpretive approach and this Court's precedents by belatedly attempting to introduce these settled interpretive concepts into the case. *See* U.S. Opp. 14-16; Kentucky Resources Council (KRC) Opp. 8-9. In employing interpretive tools the court of appeals did not mention in its opinion, the briefs in opposition have only highlighted—not dispelled—the sharp and certworthy conflict identified in the petition.

The Government suggests that the court's failure to address SMCRA's structure in its *Chevron* step-one analysis could mean that the court contemplated the statute's structure and concluded there was nothing to say about it. U.S. Opp. 15-16. Nothing in the decision supports that post hoc assessment. Kentucky Resources Council similarly contends that even though the court's opinion does not examine SMCRA's structure, purpose, or context, the court might have considered these traditional tools of statutory construction and opted not to discuss any of them in its ruling—or to explain why they were as "untelling" as Kentucky Resources claims them to be. KRC Opp. 9-10.

But the D.C. Circuit's decision was far from the "standard" and "unremarkable" *Chevron* analysis the Kentucky Resources Council portrays it as. KRC Opp. 1, 10. The court minted a non-standard, and quite remarkable, rule of statutory interpretation: When a single word in an established phrase has multiple dictionary definitions, an agency with the obligation to interpret that phrase will be accorded deference if their chosen approach falls within any of the available definitions. This unprecedented approach to *Chevron* deference radically expands the deference accorded to agencies, raises separation-of-powers questions, and inexorably tends toward the conclusion that nearly every statute is ambiguous.

The Solicitor General comfortingly suggests that the D.C. Circuit's decision "cannot be expected to have broader implications." U.S. Opp. 13. But the Solicitor General never explains how that could be so. The phrase "valid existing rights" *alone* has been employed in over 100 statutes and is subject to

interpretation by several different agencies. And if the D.C. Circuit's analysis were to be applied to other similarly well-worn agency terms of art that crop up often in the D.C. Circuit's docket ("feasible alternative,"[3] say, or "any physical change"[4]), the impact of the court's expansive *Chevron* deference becomes plainer still.

The Kentucky Resources Council for its part argues that the D.C. Circuit's opinion does not hold that "*all* terms of art are means by which Congress delegates policy-making authority." KRC Opp. 10 (emphasis in original). It is cold comfort to petitioner, its amici, and other industries and entities potentially affected by the court's new *Chevron* regime that only *some* terms of art are categorically ambiguous. And respondents offer no guidance as to when and how the D.C. Circuit in the future will determine when a term of art in a statute will contain "ambiguous" language delegating broad discretion—and when the phrase will be given its established meaning.

3. One of the most troubling consequences of the court's decision, in fact, is precisely that Congress endorsed a freewheeling agency interpretation of a term of art with a long history and an industry meaning.

Indeed, OSM itself acknowledged that until this case, VER has been a term of art in all Federal laws *other than* § 522(e) of SMCRA. 64 Fed. Reg. 70,766, at 70,794 (Dec. 17, 1999) ("Our review of these

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[3] 49 U.S.C. § 303(c).

[4] 42 U.S.C. § 7411(a)(4); *New York* v. *EPA*, 443 F.3d 880, 883-890 (D.C. Cir. 2006) (rejecting agency's dictionary definition of statutory term in light of precedent and statutory structure).

statutes, applicable case law, and the literature discussing them indicates that the VER provisions in these laws and pertinent executive orders usually protect an expectation or property interest that arose under an earlier law which is normally a Federal public lands law but may occasionally be State law."). It is precisely when Congress repeatedly uses a term that we have the clearest indication of congressional intent. See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) ("In the absence of contrary indication, we assume that when a statute uses [a term of art], Congress intended it to have its established meaning."); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art * * * absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them").

4. Both respondents point to subsequent D.C. Circuit decisions to suggest that the novel rule embraced by the panel below was merely an aberration. U.S. Opp. 16; KRC Opp. 11. But none of those decisions purports to clarify or modify—let alone repudiate—the rule articulated below. Nor would they have had any reason to do so. After all, one of the cases cited by respondents addressed a *Chevron* step two reasonableness analysis. *See Natural Res. Def. Council* v. *EPA*, 529 F.3d 1077, 1081-83 (D.C. Cir. 2008) (discussing text, structure, and legislative history in determining whether agency regulation was reasonable construction of statute under Chevron step two). This case, of course, concerns the D.C. Circuit's unprecedented approach to *Chevron step one* analysis, not step two. And the other case cited by respondents simply did not present the question at issue here. *See HolRail,*

*LLC* v. *Surface Transp. Bd.*, 513 F.3d 1313, 1317 (D.C. Cir. 2008). In *HolRail*, the court was attempting to divine the meaning of a single word—"cross"—not a statutory term of art like "valid existing rights." *See id.* The D.C. Circuit therefore had no opportunity to apply (or revisit) the troubling rule it articulated below: that an established statutory phase is nevertheless ambiguous so long as a single word in that phrase boasts multiple dictionary definitions.

The Government also attempts to sidestep the discussion of preserving property rights in SMCRA's legislative history. The Senate Report plainly states that *no provision* of the 1977 statute was intended to alter "valid existing property rights," which the Committee on Energy and Natural Resources "firmly believe[d] * * * must be preserved." S. Rep. No. 95-128 at 56 (1977) ("The Committee firmly believes that all valid existing property rights must be preserved, and has no intention whatsoever, by any provision of this bill, to change such right."). The Solicitor General nevertheless suggests that, when the Senate Report emphasized its commitment to *all* existing property rights covered by *all* provisions of the bill, it really was concerned with only one narrow set of property rights: those where the surface and mineral estates have been separated. U.S. Opp. 17. But that, of course, is not what the Report says. And the Solicitor General offers no reason for this Court to indulge his litigation position over the plain language of the statute and its accompanying Report.[5]

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[5] The D.C. Circuit opted not to review or discuss SMCRA's legislative history, which is part of the problem with the court's

5. The Solicitor General also insists that certiorari is unwarranted because, even if the D.C. Circuit had hewed to traditional methods of statutory interpretation instead of crafting an entirely new approach, the result would have been the same. U.S. Opp. 18-19. Not so. As NMA's merits briefs below demonstrated, the phrase "valid existing rights" is a term of art that that both industry and government understood to be property-protective for decades. It is only when that phrase is deconstructed and each word individually parsed is there any "ambiguity." But none of this is relevant to this Court's consideration of the petition. The fundamental flaw with the D.C. Circuit's decision below is not that it simply reached a bad bottom-line interpretation of VER—though it plainly did—but that it announced a radically new *rule* for interpreting statutes. This Court should grant the petition to review that unprecedented rule of decision.

6. The briefs in opposition offer equally subdued arguments against the second ground for certiorari articulated in the petition: whether and to what extent should courts narrow an agency's expansive interpretation to avoid foisting takings claims on the Federal Treasury? Neither respondent disputes that constitutional avoidance is particularly appropriate when takings of property are threatened. *See United States* v. *Riverside Bayview Homes*, 474 U.S. 121

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approach to statutory interpretation. Had the court considered the legislative history, this report would have featured prominently in the analysis. *See National Wildlife Fed'n* v. *Hodel*, 839 F.2d 694, 749-750 (D.C. Cir. 1988) ("Congress * * * limited the application of the surface mining proscriptions to avoid infringement of existing property rights" and "did not intend to * * * effect takings through § 522(e).").

(1985). The *Riverside Bayview Homes* Court articulated a "sensible" approach to the issue: where one interpretation of Congress's intent leads to identifiable circumstances in which takings will necessarily or even probably result and other interpretations do not, Congress likely did not intend the interpretation that triggers the taking. *Id.* at 128 n.5. NMA sought to have this "sensible" approach applied to OSM's interpretation of VER. But the D.C. Circuit declined, concluding that there did not exist sufficient *evidence* establishing that takings will occur under the VER definition adopted by the agency. Pet. 16a.

The briefs in opposition embrace the D.C. Circuit's "no evidence" approach. Gov. Opp. 24-25; KRC Opp. 16-17. But neither the D.C. Circuit nor its defenders here acknowledge what OSM itself did: that "of all the alternatives that we considered, this standard has the greatest potential to result in compensable takings" and presents "significant takings implications." 64 Fed. Reg. at 70,781. OSM further recognized that its regulation would upset "underlying property interests" and interfere with "reasonable investment-backed expectations" for many landowners and would prevent mining of thousands of acres. *Id.* at 70,776, 70,778, 70,824. And OSM understated the full takings impact of its regulation, which applies to areas that later come within SMCRA's protections as well as land currently designated under SMCRA. *See National Wildlife Fed'n*, 839 F.2d at 750-751. It is hard to envision what "evidence" (on top of OSM's candid admissions) a party would have to muster to come within *Riverside Bayview Homes*' constitutional-avoidance protection.

While the courts of appeals, including the D.C. Circuit, have tried with varying success to follow the Court's directive in *Riverside Bayview Homes*, there plainly is confusion as to how and when narrowing constructions should be applied and what amount of evidence a party must show as to likely takings before a narrowing construction is judicially applied. Granting certiorari would bring clarity to courts struggling to determine when *Chevron* deference yields to a limiting interpretation.

The confusion among the circuits cannot be chalked up to a mere intracircuit dispute, as respondents suggest. *See* Gov. Opp. 25-26; KRC Opp. 14-15. The Fifth and Eighth Circuits have held that narrowing constructions should be applied in circumstances where takings will result without references to "evidence" or the means or mode of proof. *See Texas Office of Pub. Util. Counsel* v. *FCC*, 183 F.3d 393, 437 (5th Cir. 1999) (following *Riverside Bayview Homes* and concluding that no taking resulted from agency action opening previously regulated market to competition); *Iowa Utils. Bd.* v. *FCC*, 219 F.3d 744, 754 (8th Cir. 2000) (following *Riverside Bayview Homes*, but finding it was not yet clear that a taking would result from regulatory action), *rev'd in part on other grounds sub nom. Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467 (2002). The Federal Circuit separately has opined that so long as compensation can be paid under the Tucker Act, *Riverside Bayview Homes* does not require a narrowing construction at all. *Florida Rock Indus., Inc.* v. *United States*, 791 F.2d 893, 900 (Fed. Cir. 1986). The D.C. Circuit has now held that even where an identifiable class of individuals who will have takings claims exists *and* the agency forthrightly recognizes the takings

implications of its regulation, *Riverside Bayview Homes* does not compel a narrowing interpretation to minimize such claims on the public fisc. Pet. 16a.

Responding to NMA's principal argument in a footnote, the Kentucky Resources Council asserts that the D.C. Circuit was not actually looking for "evidence" of a taking when it concluded that no "'evidence suggest[ed]'" that taking claims would expose the treasury to liability. KRC Opp. 15 (quoting Pet. 16a). The Council offers no alternative interpretation of the court's conclusion, and no credible alternative is available. The court's studious lack of attention to the facially identifiable class of takings claimants—miners with valid property rights to surface mine coal estates in a protected area who did not obtain, or make a good faith effort to obtain, permits before the land came within SMCRA's prohibitions—should be troubling, especially given this Court's previous recognition that SMCRA's VER clause is intended to prevent takings. *See Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.37 (1981).[6] The decision below exacerbates confusion

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[6] The cases cited by the Kentucky Resource Council as support for their argument that takings claims would not succeed are wholly irrelevant. KRC Opp. 18. *Rith Energy, Inc.* v. *United States*, 247 F.3d 1355, 1364 (Fed. Cir. 2001) held that the owner of a coal mining lease could not have reasonably expected that its operation would not be subject to environmental performance standards and regulatory oversight established in SMCRA. *Appolo Fuels, Inc.* v. *United States*, 54 Fed. Cl. 717, 734 (Fed. Cl. 2002) likewise held that the landowner purchased the land knowing of SMCRA's regulations and therefore could not have had the requisite reasonable investment-backed expectation that it could develop the land in ways SMCRA

over how to interpret and when to apply the *Riverside Bayview Homes* rule of constitutional avoidance.

7. SMCRA was enacted over 30 years ago. OSM still has not advanced a regulatory regime that comports with Congress's express intent to preserve pre-existing property rights. This Court in 1981 found it "premature" to consider the extent to which SMCRA worked a taking against owners and holders of private land, on the ground that SMCRA's "restrictions are expressly made subject to 'valid existing rights." *Hodel*, 452 U.S. at 296 n.37 (1981). The time has come. The Court should grant review, reverse the D.C. Circuit's decision, and enforce the rights Congress in SMCRA intended to preserve.

* * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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prohibited. Those decisions are a far cry from the circumstances here.

Supreme Court, U.S.
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William K. Suter,
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(3)

No. 08-63

IN THE

# Supreme Court of the United States

NATIONAL MINING ASSOCIATION,

*Petitioner,*

*v.*

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

## MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF ON BEHALF OF THE AMERICAN PETROLEUM INSTITUTE, THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND THE INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER

The American Petroleum Institute ("API") has received the written consent of all parties to file this *amicus curiae* brief. After API had already received consent to file this brief, the Independent Petroleum Association of America and the Independent Petroleum Association of Mountain States ("*Amici*") agreed to join with API in support of the arguments presented. However, the additional *Amici* did not have the opportunity under S. Ct. R. 37.2(a) to seek consent from the parties. *Amici* therefore move pursuant to S. Ct. R. 37.2(b) for leave to join API in filing this *amicus curiae* brief in support of the petition for writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals").

As more fully explained at pages 1-2 of the attached brief under "Interests of *Amici Curiae*," *Amici* are trade associations that, like API, represent domestic oil and gas producers. And like API's members, *Amici's* members will suffer from the burden imposed by the Office of Surface Mining's definition of the phrase "Valid Existing Rights," set forth in 30 C.F.R. § 761.5 and affirmed by the Court of Appeals, if that definition is allowed to stand.

Accordingly, *Amici* respectfully request that the Court grant *Amici* leave to file the attached brief.

Respectfully submitted,

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The American Petroleum Institute, the Independent Petroleum Association of America, and the Independent Petroleum Association of Mountain States respectfully submit this brief as *amici curiae* in support of petitioner.[1]

## INTERESTS OF *AMICI CURIAE*

*Amici* concur in the arguments advanced by the National Mining Association ("NMA") in its Petition for a Writ of *Certiorari* filed with the Court on July 14, 2008 ("NMA Petition"), and proffer the following, additional reasons why it is important that the Court grant the NMA Petition.

The American Petroleum Institute is a nationwide, non-profit, trade association headquartered in Washington, D.C. that represents over 400 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, transportation, refining and marketing.

The Independent Petroleum Association of America represents the thousands of independent oil and natural

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its members, or counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief by the American Petroleum Institute, and have been given at least 10 days notice of such filing. Those consents are being lodged herewith. Unfortunately there was not enough time to obtain the consents with respect to the other two amici.

gas producers and service companies across the United States. IPAA is a national trade association headquartered in Washington, D.C. that serves as an informed voice for the exploration and production segment of the industry.

The Independent Petroleum Association of Mountain States, founded in 1974, is a non-profit trade association representing more than 400 independent oil and natural gas producers, service and supply companies, banking and financial institutions and industry consultants committed to environmentally responsible oil and natural gas development in the Intermountain West.

*Amici* represent all segments of the domestic oil and gas industry, from the largest integrated companies to the smallest independent oil and gas producers. *Amici's* members are unified in their concern regarding the decision of the Court of Appeals finding no error in the interpretation of the phrase "valid existing rights" ("VER") adopted by the United States Department of the Interior's ("DOI") Office of Surface Mining ("OSM"). That interpretation is dramatically inconsistent with long-standing principles governing the property rights of lessees on public lands.

## SUMMARY OF ARGUMENT

The D.C. Circuit wrongly allowed DOI's novel and insupportable interpretation of VER, which engrafts an "all permits" requirement onto the well-established application of VER in withdrawal situations, to stand. If left uncorrected, that ruling threatens pre-existing

property rights and upsets the delicate balance between competing interests in resources on federal lands. Moreover, it provides precedent for DOI to apply a similarly insupportable interpretation to other withdrawals of federally-managed lands, and could therefore seriously disrupt what to this point had been the settled right and expectation to develop a federal oil and gas lease once it is issued by DOI. DOI's interpretation would thus threaten the value of such leases and may deter investment by the domestic oil and gas industry in production onshore and on the Outer Continental Shelf ("OCS"), an unacceptable outcome given today's prevalent energy challenges.

## I.

A. The D.C. Circuit's ruling upsets the balance between the use and conservation of resources on federal lands achieved through the well-accepted application of VER prior to DOI's interpretation. Congress has declared the development of federally-managed onshore and offshore oil and gas resources to be a national priority. Property rights to develop oil and gas resources accrue to a leaseholder upon issuance of the lease; yet, due to both regulatory and economic factors, it often takes substantial time and financial resources to commence production. Secure in these property rights, *amici*'s members, who hold large numbers of leases, have invested billions of dollars over many years to secure and develop these leases.

B. Other demands on federal lands must be balanced against resource development. These competing uses include recreation, wilderness, and

conservation. Acting pursuant to various authorities, Congress and the Executive accordingly may designate and withdraw areas from leasing or development.

C. VER serves as the essential tool preserving the balance between these competing demands. By regularly including VER provisions in over 100 federal laws, Congress recognizes that, despite its plenary authority over the use and disposition of federal lands and interests therein, preexisting property rights in federal oil and gas leases in a withdrawn area must be respected. VER provisions instill confidence in existing and prospective domestic oil and gas producers that future withdrawals will not upset their considerable investment or require expensive takings litigation.

## II.

Given the importance of VER, future withdrawals coupled with compromised VER provisions would strip the rights of federal lessees and, consequently, may deter important future investment in domestic oil and gas resources on federal lands. DOI's VER interpretation, which superimposes a requirement that a producer not only holds a valid lease but also has obtained all necessary permits prior to withdrawal of the area from further mineral leasing and development, unfortunately achieves precisely this result. An oil and gas lessee may spend billions of dollars on bonuses, rentals and exploration costs before it is even in a position to apply for its development permits. And, given the need for exploration and planning, the lessee will not be able to submit that permit application until many years after the lease is issued.

Under DOI's VER interpretation, during the multi-year window between leasing and receipt of permits, every federal oil and gas lessee would face the threat of unilateral cancellation by the government of leases in which it has invested potentially billions of dollars. DOI's VER interpretation ignores the considerable time required to obtain permits after a lease is issued and jeopardizes a lessee's property rights until production is feasible and imminent. Though DOI's VER interpretation at this point applies only to coal mining under the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1272(e), DOI could seek to extend similar VER interpretations in the future to analogous federal land contexts.

## III.

Because DOI's VER interpretation threatens to take lessees' development rights, it also may diminish existing and future lessees' incentive to invest in domestic resources on federal lands and ultimately may result in decreased domestic production. Such deterrence is particularly troubling given the already restricted opportunities for domestic production and the national debate surrounding the opening of new areas to leasing. In a time of pervasive energy challenges nationwide, DOI's VER interpretation would have the undesirable effect of making federally-managed resources even less attractive.

## IV.

DOI's VER interpretation deserves no deference because it conflicts with contemporaneous interpretations of VER at the highest agency level. Indeed, concurrent with OSM's rulemaking setting out its "all permits" requirement, the DOI Solicitor published a formal opinion, concurred in by the Secretary and binding on OSM, concluding that property rights embodied in a valid mining claim could alone establish VER without any permit requirement. In such circumstances, DOI's contrary VER interpretation is unreasonable and the D.C. Circuit was wrong to defer.

## ARGUMENT

### THE COURT'S REVIEW IS NECESSARY BECAUSE THE DEPARTMENT OF THE INTERIOR'S "VER" INTERPRETATION COULD THREATEN THE CONTINUED VIABILITY OF FEDERAL OIL AND GAS DEVELOPMENT

Prior to DOI's 1999 interpretation of VER, it was generally recognized that the holder of a property right to develop minerals on federally-administered land, whether through a federal oil and gas lease,[2] a federal coal lease,[3] or a valid mining claim,[4] was protected from

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[2] *Union Oil Co. of California v. Morton*, 512 F.2d 743, 750-51 (9th Cir. 1975).

[3] *NRDC v. Berklund*, 609 F.2d 553, 559 (D.C. Cir. 1980).

[4] *Wilbur v. United States ex rel. Krushnik*, 280 U.S. 306, 316-17 (1930); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-37 (1963).

the effects of future regulatory actions withdrawing that area from mineral development. The Court of Appeals, however, affirmed DOI's interpretation of VER as requiring not only the existence of a property interest but also that the holder acquire or reasonably attempt to acquire requisite permits necessary for production. The oil and gas industry is concerned that this "VER Plus" definition, if left unchecked, is clear precedent that may be applied to existing and future VER provisions that affect federal oil and gas leases. This real possibility seriously threatens the value of federal oil and gas leases and could deter the domestic oil and gas industry from investing in oil and gas production onshore and on the OCS.

Adverse impacts to this Nation's oil and gas production capability could not come at a worse time. Our Nation faces historically-high energy prices. Restrictions on leasing that defy existing property rights and put significant volumes of our oil and gas resources off-limits challenge our economic stability and threaten our national security.

## I. VER HAS TRADITIONALLY SERVED AS THE LINCHPIN BALANCING PRE-EXISTING EXPLORATION AND DEVELOPMENT RIGHTS AND FUTURE CONSERVATION INTERESTS ON PUBLIC LANDS

### A. FEDERAL OIL AND GAS LEASE EXPLORATION AND DEVELOPMENT IS A COSTLY AND HIGHLY REGULATED PROCESS

Development of federally-managed oil and gas resources is an important national policy. 43 U.S.C. § 1701(a)(12) ("The Congress declares that it is the policy of the United States that . . . the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals . . ."); 43 U.S.C. § 1332(3) ("[T]he outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development . . ."). *Amici's* members hold property rights in large numbers of oil and gas leases on federal lands onshore and on the OCS issued under various mineral leasing laws administered by DOI.[5] As of 2007, there were well in excess of 28,000 producing federal oil and gas leases.[6]

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[5] The principal mineral leasing laws for oil and gas include the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.* ("OCSLA"); the Mineral Leasing Act ("MLA"), 30 U.S.C. §§ 181 *et seq.*; and the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351 *et seq.*

[6] *See* Minerals Mgmt. Serv. ("MMS"), *2001-Forward MRM Statistical Information*, http://www.mrm.mms.gov/MRMWebStats/Home.aspx (last visited Aug. 11, 2008).

Oil and gas production from onshore and offshore federal lands is particularly vital to our Nation's economic well-being, accounting for 35% of domestic oil production and 30% of domestic natural gas production as of 2006.[7]

Federal oil and gas leases are issued with a primary term generally ranging from five to ten years. *See, e.g.*, 30 C.F.R. § 256.37 (stating that initial term of oil and gas leases on the OCS shall be for five years and cannot exceed ten years). Thereafter, the leaseholder retains lease rights as long as there is production from the lease in paying quantities. *Id.* Property rights are conferred upon lease issuance, *see* Jan G. Laitos, *The Nature & Consequence of "Valid Existing Rights" Status in Public Land Law*, 5 J. MIN. L. & POL'Y 399, 416 (1989) [hereinafter Laitos, *The Nature & Consequence of "Valid Existing Rights"*], but it generally takes years of diligent effort and significant investment to obtain the requisite permits and approvals to bring a lease into production, particularly on the OCS. *See, e.g.*, Minerals Management Service ("MMS"), OCS Report, MMS 2008-013, *Deepwater Gulf of Mexico 2008: America's Offshore Energy Future* 76-77 (2008) ("MMS Report").[8] During those years, the leaseholder

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[7] Energy Info. Admin., *Oil and Natural Gas Market Supply and Renewable Portfolio Standard Impacts of Selected Provisions of H.R. 3221* (Dec. 2007), http://www.eia.doe.gov/oiaf/servicerpt/bmy/index.html (last visited Aug. 11, 2008).

[8] *Available at* http://www.gomr.mms.gov/PDFs/2008/2008-013.pdf (last visited Aug. 11, 2008); *see also* American Petroleum Inst., *OCS Moratoria Fact Sheet*, http://www.energytomorrow.org/energy/OCS_Moratoria_ Fact_Sheet.aspx (last visited Aug. 11, 2008).

may spend billions of dollars for exploration and development of its lease on top of the millions of dollars that may have been paid in bonus bids to secure the lease in the first place. *Id.* Costs to develop in the deepwater OCS, likely the best prospect for future development, are particularly staggering. MMS Report at 14. All of this investment is made in good faith reliance on those property rights received under the lease contract.

Compounding the enormity of the costs sunk into development is the fact that it will take years, if ever, for a lessee to see a return on its investment. This is especially true offshore, where production may not occur for as many as ten years depending on the complexity of the engineering challenges, including water and drilling depths and the geological characteristics of the reservoir, that lessees must overcome in developing their leases. *Id.* at 14, 76-77. In addition, lessees seeking to develop their offshore leases face a burdensome, multi-step permitting process. *Id.* at 39. For example, before drilling can even begin, MMS must first approve a highly-technical Exploration Plan that involves an extensive review of geological, geophysical and engineering data, all of which must be developed by the lessee. 30 C.F.R. § 250.201. Further, before the lessee may begin production, MMS must approve a Development and Production Plan or Development Operations Coordination Document, another highly-technical document. *Id.* Of course, an oil and gas lessee must obtain a variety of other permits to satisfy its obligations under other environmental statutes before production may begin. *See* 30 C.F.R. § 250.281.

## B. FEDERAL LANDS ARE SUBJECT TO COMPETING RESOURCE DEMANDS AND MAY BE WITHDRAWN FROM FURTHER DEVELOPMENT

The need to develop our Nation's federally-managed mineral resources is always balanced against competing resource values. *See, e.g.*, 43 U.S.C. § 1701(a)(8) (declaring that it is the policy of Congress, *inter alia*, that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values"). In addition to their substantial mineral resource values, our Nation's federal lands often are visually unique and have value for purposes including recreation, wilderness, archeological resources, and other uses. The significance of these other resource values regularly subjects these lands to consideration by Congress, the President, or the Secretary of the Interior for mixed uses, including withdrawal from further mineral development. Similarly, our coastal states have resources important to uses such as tourism and recreational opportunities. In consideration of these coastal resources and other concerns, Congress and the President likewise may withdraw areas of the OCS from leasing and development.

Various authorities are available to Congress and the Executive to achieve that purpose. Through the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, Congress has plenary authority over disposition of federal lands and resources. Well over 100 statutes have authorized withdrawal of lands from application of the mineral leasing laws and other mineral disposition statutes.

*See* Appendix E to NMA Petition ("NMA Appendix E"). Congress uses this authority to designate national parks, wildlife refuges, recreation areas, and wilderness areas (to name but a few), precluding new leasing and development of oil and gas in these designated areas. For the past 27 years, Congress also has imposed an annual moratorium on oil and gas leasing for most areas of the OCS except the Central and Western portions of the Gulf of Mexico, small portions of the Eastern Gulf of Mexico, and certain areas offshore of Alaska. *See, e.g.*, Appropriations Act of Dec. 23, 1981, Pub. L. No. 97-100, 95 Stat. 1399 (Dec. 23, 1981) (the first appropriations bill to contain the moratorium on leasing).

Congress also has delegated certain withdrawal authority to the Executive Branch. Recently, Presidents Bush and Clinton have utilized the authority granted by the Antiquities Act, 16 U.S.C. §§ 431 *et seq.*, to withdraw lands in Hawaii[9] and Utah,[10] respectively. Similarly, OCSLA authorizes the President to withdraw areas of the OCS from consideration for leasing. 43 U.S.C. § 1341(a). The Secretary of the Interior also has authority to withdraw lands from disposition. Under the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431 *et seq.*, the Secretary may designate marine sanctuaries as areas off-limits to mineral development. The Secretary also may temporarily withdraw lands from

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[9] Establishment of the Northwestern Hawaiian Islands Marine National Monument, Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 26, 2006).

[10] Establishment of the Grand Staircase-Escalante National Monument, Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 24, 1996).

further mineral development while Congress considers a permanent withdrawal. *See, e.g.*, 16 U.S.C. § 3213; 43 U.S.C. § 1714(c).

### C. VER IS THE LEGAL "GLUE" THAT PRESERVES THE RIGHTS OF PUBLIC AND PRIVATE PROPERTY HOLDERS BY BALANCING COMPETING INTERESTS IN PUBLIC LANDS

Obviously, if Congress or the Executive directly extinguished pre-existing federal oil and gas lease rights in an area for which it is implementing a withdrawal, the existing property-right holders would have an action against the government for breach of contract and unlawful taking in violation of the Fifth Amendment to the United States Constitution. *See Mobil Oil Exploration & Producing S.E., Inc. v. United States*, 530 U.S. 604, 607 (2000); *United States v. Winstar Corp.*, 518 U.S. 839, 843 (1996); *Union Oil*, 512 F.2d at 750-51. To avoid that legal consequence, Congress or the President typically includes a provision that protects VER. *See, e.g.*, Wilderness Act of 1964, 16 U.S.C. § 1133(d)(3); Establishment of the Grand Staircase-Escalante National Monument, Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (Sept. 24, 1996) ("The establishment of this monument is subject to valid existing rights."); *see also* NMA Appendix E. Such provisions embody the well-understood concept that persons who hold existing mineral leases and property rights in newly protected areas have the right to continue to enjoy those property rights (although development may become more difficult as a consequence of the withdrawal). *See* NMA Petition at 8-9 n.16.

VER preserves a delicate and important balance in federal property law that has developed over many years. The various statutory VER provisions reflect Congress' recognition that, while it has plenary authority over the use and disposition of federal lands and interests in land, and therefore may remove or withdraw those lands from use or disposition for mineral development or any other purpose, there likewise is a requirement to respect pre-existing private interests in those federal lands and resources at the time of withdrawal.

If Congress did not regularly include VER provisions in federal statutes that withdraw lands from previously acceptable mineral disposition and other uses, few, if any, would invest in developing federal resources because of the very real prospect that, at any time, Congress may render their efforts effectively worthless. At best, the affected rights holders would face years of litigation to recover their prior investment from the government through an action for a taking or breach of contract. VER is the "glue" that holds this delicate balance together — Congress or the Executive may withdraw lands and resources from previously acceptable uses, but those who made investments in those resources prior to withdrawal are entitled to retain the benefit of their efforts.

## II. "VER PLUS" UPSETS THE BALANCE BETWEEN USE AND CONSERVATION OF RESOURCES

DOI's VER Plus interpretation of SMCRA departs dramatically from the well-recognized application of VER in withdrawal situations. VER provisions generally require only the demonstration of a valid property right to produce minerals that pre-dates the withdrawal. Laitos, *The Nature & Consequence of "Valid Existing Rights"* at 425. DOI's VER Plus, however, requires not only the demonstration of a valid property right but also demonstration of a lessee's satisfaction of additional conditions (*i.e.*, all permits required to begin production have been obtained or applied for). *See* 30 C.F.R. § 761.5.

There is no reasoned basis to distinguish the property interest granted under a federal coal lease subject to DOI's VER Plus interpretation from the property interest granted under a federal oil and gas lease. Federal coal leases are issued under the same leasing statute as onshore oil and gas leases. *Compare* 30 U.S.C. § 201 (coal) *with* 30 U.S.C. § 226 (oil and gas onshore). Therefore, under the Court of Appeals' decision, nothing would prevent DOI from applying VER Plus in the onshore oil and gas context should the area where the lease is located be withdrawn from further development by a post-lease statute or Executive action. Further, because the leasing regime for offshore leases under OCSLA, 43 U.S.C. § 1337, is the same as under the MLA, *see Fina Oil & Chem. Co. v. Norton*, 332 F.3d 672, 673 (D.C. Cir. 2003), the same concern applies for offshore leases.

If VER Plus were applied to the federal oil and gas leasing regime, the delicate balance between use and conservation of resources would falter. A federal oil and gas lease grants the leaseholder the right to develop mineral resources thereunder without unreasonable restriction. *See, e.g., S. Utah Wilderness Alliance*, 159 IBLA 220, 240-41 (2003). DOI's VER Plus standard alters that important legal principle by limiting that development right only to situations where the lessee effectively is ready to commence production because it has obtained all permits or made a good faith effort to do so. Until such time, *the functional effect of the DOI regulation is that the lessee's rights under its lease are subject to unilateral termination by the government.* Because it may take years from the time a lease is issued to obtain the requisite regulatory approvals and permits to begin production from a federal oil and gas lease, particularly on the OCS, the lessee risks losing its property rights and substantial investment any time before it begins production.

This is particularly problematic where either the MMS or the Bureau of Land Management ("BLM") has directed a suspension of a federal lease, *see* 30 C.F.R. §§ 250.168 - 250.177 (MMS); 43 C.F.R. § 3103.4-4 (BLM), during which time the lessee is prevented from conducting those activities on the lease necessary to obtain requisite permits. Because these suspensions frequently remain in effect for years, *see California v. Norton*, 311 F.3d 1162, 1173 n.6 (9th Cir. 2002), during that entire time the lessee would be at risk of losing its lease if Congress subsequently withdrew the area from mineral disposition. VER Plus exacerbates that risk.

## III. "VER PLUS" DISRUPTS EXISTING PROPERTY RIGHTS AND MAY RESULT IN REDUCED OIL AND GAS PRODUCTION FROM FEDERAL LEASES

Investing in domestic exploration and development has historically been attractive to the oil and gas industry because of the certainty of the property rights granted under federal mineral leases. If that certainty no longer exists, domestic oil and gas companies will likely be less willing to pay tens of millions of dollars in bonus bids for oil and gas leases if the Federal Government later may declare the area off-limits and leave the lessee with a non-producible lease if it has not yet acquired all the requisite permits to begin production. This new threat — that a lease does not provide a secure right to produce — will be most acutely felt in those areas with a significant risk of withdrawal.

For example, millions of acres of the OCS currently are unavailable for leasing and development pursuant to a moratorium that has been renewed annually for the past 27 years. *See, e.g.*, Pub. L. No. 97-100 (Dec. 23, 1981). In 2006, some of the areas of the Eastern Gulf of Mexico previously subject to the moratorium were made available for leasing as a consequence of the Gulf of Mexico Energy Security Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (Dec. 20, 2006) ("GOMESA"). Lease sales were held pursuant to GOMESA in October 2007 and March 2008, resulting in bonus bids in the tens of millions of dollars and another lease sale is anticipated in 2009.[11] Moreover, today, as a consequence of

[11] *See* http://www.mms.gov/offshore/gomesa/gomesa.htm (last visited Aug. 11, 2008).

historically-high oil prices, Congress is embroiled in a heated debate over opening additional areas of the Eastern Gulf of Mexico and Atlantic OCS to leasing and development.[12] Lifting the moratorium even has become an important issue in the presidential campaign, as both major-party candidates have expressed support for increased offshore development.[13]

Opening new areas to leasing is equally controversial onshore. Most recent federal onshore oil and gas lease sales held by the BLM have been challenged. *See, e.g., S. Utah Wilderness Alliance v. U.S. DOI*, 2007 U.S. Dist. LEXIS 55562 at *4-5 (D. Utah July 30, 2007) (Kimball, J.). Issues include concerns about impacts of development on wildlife, air quality, and archeological resources as well as on areas that are considered by some to be of wilderness quality. *See, e.g., S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253 (D. Utah 2006). The debate is more animated when BLM seeks to offer new areas that were not extensively leased, like Colorado's Roan Plateau.[14] For the most part, BLM

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[12] *See, e.g.*, Steven Lee Myers & Carl Hulse, *Bush Lifts Drilling Moratorium, Prodding Congress*, N.Y. TIMES, July 14, 2008, *available at* http://www.nytimes.com/2008/07/14/washington/14drillcnd.html?_r= 2&sq=Drilling%20 Moratorium&st=cse&adxnnl=1&oref=slogin&scp=1&adxnnlx=1218560935-m58a960jOgjprPxNZT3aAQ (last visited Aug. 11, 2008).

[13] *See, e.g.*, Larry Rohter, *Obama, in New Stand, Proposes Use of Oil Reserve*, N.Y. TIMES, Aug. 5, 2008 at A14.

[14] *See, e.g.*, Press Release, *More than 17,000 Protest BLM Decision to Lease the Roan Plateau, available at* http://www.saveroanplateau.org (last visited Aug. 11, 2008).

has proceeded to issue leases in these controversial areas, but some in Congress have sought to place certain of these areas off limits to development.[15]

Opening federally-managed lands onshore and offshore to new or expanded oil and gas development is critical to the vitality of the domestic oil and gas industry, but the process is continually scrutinized. While Congress and BLM have recently pursued leasing certain new areas offshore and onshore, Congress or the Executive could withdraw controversial areas from further leasing and development, subject to VER. If this were to occur and VER Plus were to apply to existing oil and gas lessees who have expended billions of dollars on bonuses, rentals, and exploration costs, they will not be able to proceed with developing their leases if they have not, in addition to possessing valid property rights in the form of oil and gas leases, satisfied the additional conditions imported by DOI, which in this case would be obtaining all their permits.

If the ruling below stands, future BLM- and MMS-sponsored lease sales could be significantly impacted. If potential lessees should participate, they will risk less money in bonus bids. The Federal Government thus could receive fewer bids for leases and less revenue from bonus bids because of legal uncertainties regarding the sanctity of property rights conveyed by the lease. Companies could divert more revenue to exploration and development outside the United States, ultimately

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[15] *See, e.g.*, http://www.markudall.com/page/s/SaveTheRoan (last visited Aug. 11, 2008).

decreasing domestic reserves and increasing dependence on foreign and less secure sources of supply. In short, the risk that DOI could impose its VER Plus interpretation on federal oil and gas leases will undeniably make federally-managed lands less attractive for oil and gas development, resulting in a possible reduction in federal revenues and in domestic production from federal lands.

## "VER PLUS" IS UNREASONABLE AND NOT ENTITLED TO DEFERENCE BECAUSE IT CONFLICTS WITH THE SECRETARY OF THE INTERIOR'S CONTEMPORANEOUS APPLICATION OF VER TO FEDERAL MINERALS

Coal, hard-rock minerals (*e.g.*, gold, silver, and copper), and oil and gas are the three most significant mineral regimes on federal lands. Between 1997 and 1999, OSM went through a rulemaking and adopted VER Plus for coal. In the midst of the rulemaking process, the Solicitor of the Department of the Interior ("Solicitor"), who is the chief legal officer for all DOI bureaus (including OSM), issued a formal opinion addressing VER in the hard-rock mining context. He reached a conclusion consistent with the prevailing definition of VER rather than VER Plus. This conflicting and binding Opinion demonstrates that OSM's interpretation is arbitrary and capricious and not entitled to deference as a legal matter, justifying this Court's grant of *certiorari* to review the decision below. Moreover, inconsistency in the administrative interpretation of the same legal concept in two regimes creates great uncertainty as to which interpretation

DOI will apply to the third mineral regime, oil and gas, calling into question the sanctity of existing property rights.

## I. THE 1998 SOLICITOR'S OPINION RECOGNIZES EXISTING PROPERTY RIGHTS

In a formal published opinion, "Patenting of Mining Claims and Mill Sites in Wilderness Areas," M-36994 (May 22, 1998) ("Solicitor's Opinion"), concurred in by the Secretary of the Interior, the Solicitor addressed the rights of certain holders of mining claims located pursuant to the Mining Law of 1872, 30 U.S.C. §§ 21 *et seq.*, in areas within the National Wilderness Preservation System[16] withdrawn from further mineral entry and leasing under the Wilderness Act, 16 U.S.C. § 1133(d)(3). The Wilderness Act was enacted in 1964, but allowed for continued location of mining claims, and issuance of federal mineral leases, until December 31, 1983. It then provides:

> Subject to valid rights then existing, effective January 1, 1984, the minerals in lands designated in this Act as wilderness areas are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto.

*Id.* Thus, for covered areas, the Wilderness Act allowed the location of mining claims under the Mining Law of

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[16] Areas within the National Wilderness Preservation System are also expressly included in SMCRA § 522(e).

1872, and issuance of federal leases for oil and gas, coal and other minerals pursuant to the Mineral Leasing Act, 30 U.S.C. §§ 181 *et seq.*, until December 31, 1983. Thereafter, subject to "valid rights then existing," further mineral dispositions were prohibited.

The Solicitor's Opinion addressed whether, under a different provision of 16 U.S.C. § 1133(d)(3)[17] that specifically addressed valid existing rights to a patent,[18]

> claims where the claimant properly located a mining claim and made a discovery of a valuable mineral deposit before the land in question was designated as wilderness, but for which the claimant had not established a right to a patent before the land was designated as wilderness . . . should be patented without a reservation of the surface estate.

Solicitor's Opinion at 4-5. In analyzing this issue, the Solicitor reviewed all the VER provisions within § 1133(d)(3), including the provision quoted above. The Solicitor opined: "[i]n short, nothing in the language of section 4(d)(3) . . . affects a claimant's ability to continue

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[17] "[A]nd hereafter, subject to valid existing rights, all patents issued under the mining laws of the United States affecting national forest lands designated by this Act as wilderness areas [including BLM lands, *see* Solicitor's Opinion at 2 n.4] shall convey title to the mineral deposits within the claim . . ."

[18] The Mining Law, 30 U.S.C. § 29, provides the procedure by which a mining claimant may apply for a patent, *i.e.*, fee title to a validly located claim.

to develop the valuable minerals on a preexisting unpatented mining claim, so long as a valid claim had been established as of the time the land was withdrawn from further appropriation under the mining laws." *Id.* at 8.

This conclusion reached by DOI's chief legal officer and the Secretary in 1998, in the midst of the rulemaking adopting the VER Plus interpretation, diverges 180 degrees from OSM's unique permits-plus interpretation. While OSM interprets VER as requiring more than just the legal entitlement to mine, the Solicitor and the Secretary concluded that the existence of property rights embodied in a valid mining claim alone was adequate to establish VER, thereby protecting those rights from the consequences of a later withdrawal of the affected lands. OSM's departure from the latter, accepted VER interpretation would be further pronounced if applied to withdrawals from oil and gas development given that vested property rights even more clearly predominate in the leasing context. *See* Laitos, *The Nature & Consequence of "Valid Existing Rights"* at 416-17.

## II. OSM'S INTERPRETATION IS NOT ENTITLED TO *CHEVRON* DEFERENCE BECAUSE OF DOI'S ARBITRARY AND CAPRICIOUS, CONFLICTING INTERPRETATIONS OF VER

While an agency's construction of the laws it is charged to implement is entitled to substantial deference, *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991), the agency's interpretation must not be arbitrary or capricious,

*Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). Here, the D.C. Circuit did not find OSM's interpretation to be unlawful, even though it had changed its interpretation over the years since SMCRA's passage, with OSM ultimately concluding that VER must be limited by the all permits-plus standard. 512 F.3d 702, 712 (D.C. Cir. 2008).

DOI policy states that the Solicitor's formal legal opinions, or "M-Opinions," are "binding on all other Departmental offices and officials and . . . may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary." DOI Departmental Manual, Part 209, Chapter 3.2A(11) (209 DM 3.2A(11)).[19] The Acting Assistant Secretary of the Department of the Interior, who signed the Final Rule establishing VER Plus, does not qualify as an agency official entitled to depart from or otherwise alter the Solicitor's Opinion. OSM's interpretation is therefore entitled to no deference. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-47, n.30 (1987) (rejecting agency interpretation of statute on ground that interpretation was not consistent with congressional intent, and finding agency's interpretation was not entitled to heightened deference because it had been inconsistent over time).

OSM sought to justify its cramped interpretation of VER by relying on Congress' interest in protecting

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[19] *See* http://elips.doi.gov/app_home/index.cfm?f useaction =home (last visited Aug. 11, 2008). This policy was recently reaffirmed in a 2001 agency Memorandum, issued by the same Solicitor responsible for the 1998 Solicitor's Opinion described above. "Binding Nature of Solicitor's M-Opinions on the Office of Hearings and Appeals" (Jan. 18, 2001).

sensitive areas, like national parks and wildlife refuges, from the impacts of surface mining. *See, e.g.*, Valid Existing Rights, Final Rule, 64 Fed. Reg. 70,766 (Dec. 17, 1999)

> Congress did not define VER, and the legislative history of section 522(e) emphasizes that, with certain exceptions, Congress intended to prohibit new surface coal mining operations on the lands listed in that section. . . . We believe that these facts argue against adoption of a rule that defines VER solely in terms of property rights.

In OSM's view, the concept of VER may be limited when the resources that Congress is seeking to protect have particularly significant values to the public. However, OSM's attempt at this distinction fails. The Solicitor's Opinion addressed VER in the National Wilderness Preservation System — the very same federal lands included within the scope of the protections provided under SMCRA § 522(e) — and provides no basis to diverge from the standard interpretation of VER.

## III. INCONSISTENT DOI OPINIONS REGARDING VER UPSET THE DELICATE BALANCE BETWEEN DEVELOPMENT AND CONSERVATION

That OSM and the Solicitor, within a year, could reach such divergent opinions about the scope of VER demonstrates the fallacies of the D.C. Circuit's opinion subject to the pending petition for *certiorari*. The long-standing VER policy of the Department of the Interior

acts as the "glue" that preserves the balance between the competing interests of protecting pre-existing property rights in the development of minerals on public lands and preserving interests in conservation of the same lands. Allowing the agency to subject the VER standard to dramatically different interpretations threatens the core of oil and gas exploration on federal lands. The Supreme Court should grant *certiorari* in this matter to prevent the D.C. Circuit's decision from dissolving that glue.

## CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant NMA's petition for a writ of *certiorari*.

Respectfully submitted,

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No. 08-63

IN THE
# Supreme Court of the United States

NATIONAL MINING ASSOCIATION
*Petitioners,*

v.

DIRK KEMPTHORNE, SECRETARY
OF THE INTERIOR, *et al.*,
*Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals for
the District of Columbia Circuit

## BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL OF COAL LESSORS IN SUPPORT OF THE PETITIONERS

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## INTEREST OF THE AMICUS[1]

This case presents the question of whether the Secretary of the Interior has impaired state created property rights by his interpretation of a statutory directive to preserve "valid existing rights" ("VER"). As provided by Section 522(e) of the federal Surface Mining Control and Reclamation Act of 1977, the VER preserves the property rights of coal owners in areas where the statute otherwise restricts new coal mining. The National Council of Coal Lessors, Inc., is an organization whose members include companies, trusts, families, and individuals who own coal throughout the United States. The members of the National Council of Coal Lessors (collectively "Amicus") own coal estates recognized by state law. In some instances the coal is owned as part of the land in fee simple absolute, but in most instances, the coal has been severed from the surface estate. Amicus members may sell the coal outright or lease the coal estate to companies in the business of building and operating coal mines in exchange for various forms of consideration, principally a royalty on the coal produced and sold.

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[1] As required by Supreme Court Rule 37.2(a), Counsel of record for all parties received notice no later than 10 days prior to the due date of the amicus curiae's intention to file this brief. The parties have consented to the filing of this brief. Letters expressing their consent have been filed with the Clerk. As required by Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or the counsel made a monetary contribution to its preparation or submission

## INTRODUCTION

Coal in the ground is real property and can be held as an interest in real estate separate from the surface. The coal estate can be conveyed separately from the surface, or other minerals. Even separate veins or seams of coal can be conveyed separately from one another. A freehold estate in coal can be created by a grant from the surface owner or by a reservation in a conveyance of the surface. This has been the longstanding and enduring rule under our common law over the past two centuries. *See generally* 3 *Lindley on Mines* § 812 (3d ed. 1914).[2]

A freehold estate in coal carries all the incidents of fee simple ownership and is inheritable, taxable, subject to dower interest at common law, and entitled to separate compensation in the event of condemnation. As a separate and independent estate in land, an interest in coal can be owned or held in any of the estates or lesser interests in which real property in general can be owned or held. With the severance of the coal from the surface, the owner of the coal estate does not lose title, rights or possession by non use, nor does the surface owner acquire title to the coal estate by exclusive and continuous

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[2] *Caldwell v. Fulton*, 31 Pa. 475 (1858); *Marvin v. Brewster Iron Min. Co.*, 10 Sickels (55 N.Y.) 538, (N.Y. 1874); *Wardell v. Watson*, 5 S.W. 605 (Mo. 1887); *Kincaid v. McGowan*, 4 S.W. 802 (Ky. 1887); *Williams v. Gibson*, 4 So. 350 (Ala. 1888); *Ames v. Ames*, 43 N.E. 592 (Ill. 1896); *Gill v. Fletcher*, 78 N.E. 433 (Ohio 1906); *Porter v. Mack Mfg. Co.*, 64 S.E. 853 (W.Va. 1909); *Board of Com'rs of Greene County v. Lattas Creek Coal Co.*, 100 N.E. 561 (Ind. 1913).

occupation of the surface. *See Scott v. Laws*, 215 S.W. 81, 82 (Ky. 1919); *Gill v. Fletcher*, 78 N.E. 433, 435 (Ohio 1906). *Crouch v. Puryear, 1 Rand. (22 Va.) 258 (Va. 1822).*

"Practically considered, the grant of coal is the grant of a right to remove it." *Chartiers Block Coal Company v. Mellon*, 25 A. 597, 599 (Pa. 1893). As a consequence, the grant itself conveys all rights to use the surface in such manner and with such means as is fairly necessary for the enjoyment of the coal estate. *See, e.g., Williams v. Gibson*, 4 So. 350, 353 (Ala. 1888); *Squires v. Lafferty*, 121 S.E. 90, 91 (W.Va. 1924). Reasonable uses of the surface include ingress and egress, the right to build roads, mine openings, processing and loading facilities, and other improvements related to the mining, preparation and transportation of the coal. *See, e.g., Wardell v. Watson*, 5 S.W. 605, 606 (Mo. 1887); *Porter v. Mack Manufacturing Co.*, 64 S.E. 853, 855 (W. Va. 1909); *Creasey v. Pyramid Coal Co.*, 61 N.E. 2d 477, 480 (Ind. 1945).

Whether a grant or reservation of the coal estate also carries the right to mine the coal by surface mining methods is a question that has generated various rules of construction under state common law. As a general matter, if the language of the conveyance is explicit it will be given effect. However, if the written instrument is ambiguous the purpose or intent of the parties is determined from the language used in light of the circumstances under which it was written. *See, e.g., Commonwealth v. Fitzmartin*, 102 A. 2d 893, 897 (Pa. 1954); *Dept. of Forests and Parks v. George's Creek Coal & Land Co.*,

242 A. 2d 165, 172 (Md. 1968); *Christman v. Emineth*, 212 N.W. 2d 543, 550 (N.D. 1973); *Skivolocki* v. *E. Ohio Gas Co.*, 313 N.E. 2d 374, 378-379 (Ohio 1974); *Phillips v. Fox*, 458 S.E. 2d 327, 335 (W. Va. 1995).

It is against this backdrop of state property law which Congress legislated when it enacted SMCRA. Both the text and history of SMCRA demonstrate a purposeful design to verify, but not interfere with, the property rights established under state law. Permit applicants submit to the state regulatory authority a statement of the legal documents providing the rights to mine the lands in the permit area. 30 U.S.C. § 1257(a)(9). However, where surface mining is proposed, and the surface and mineral estates has been severed, the state regulatory authority verifies that the applicant possesses rights to surface mine under state law. *Id.* § 1260(b)(6).

The legislative history confirms that "the Act does not tamper with such State [property] laws; all valid existing property rights must be preserved; and [there is] no intention whatsoever, by any provision of this bill, to change such rights." S. Rep. No. 95-128, at 56 (1977). *See* also H.R. Rep. 95-493, at 106 (1977) (right to surface mine determined by applicable State law).

Amicus' members may only convey through any coal lease the property rights and interests they own as part of their coal estate. The property interests and rights in a coal estate consist not only of the right to mine, remove and sell the coal, but also the appurtenant rights to use the surface in such manner and by such means as is necessary to carry on mining

operations. The value of Amicus members' coal and the leases to mine it are extinguished, or severely diminished, without the rights to possess and use the surface in order to mine and remove the coal.

Amicus members' property interests and rights in the coal they own were established prior to enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201 *et seq.*, a law which regulates the mining and reclamation of lands mined for coal. SMCRA also imposes prohibitions on conducting new surface coal mining operations within or nearby certain designated lands or features enumerated at 30 U.S.C. § 1272(e). SMCRA, however, expressly provides that these new restrictions are "subject to valid existing rights." *Id.*

The well established meaning of the term "valid existing rights (VER)," used in numerous other federal laws before and since 1977, includes property interests and rights acquired prior to enactment of a statute that changes the status quo. Here, the Secretary has departed from VER's traditional meaning by preserving only those pre-existing interests and rights that were also accompanied by applications for all permits necessary to open a mine *before* enactment of SMCRA. And, coal owners were not advised of this unusual stipulation until well *after* SMCRA's enactment. See 64 Fed. Reg. 70,776-70,838 (Dec. 17, 1999).

This unprecedented departure from the well established meaning of VER has not merely burdened Amicus members' property rights; it has summarily

extinguished them by rule. To be clear, Amicus members do not maintain that their valid existing rights in coal exempt them or their lessees from SMCRA's permitting, performance and reclamation requirements. Instead, Amicus' interest here is in assuring that its members pre-existing rights to surface mine coal, or use of the surface of coal lands in connection with either surface or underground coal mines as authorized by state law, are preserved. If their coal property interests are not so recognized, then no permits under SMCRA for surface coal mining operations can be granted.

## SUMMARY OF ARGUMENT

The Secretary has defined the VER exception to SMCRA's proscriptions on new surface coal mining operations in a manner that destroys rather than preserves pre-existing property rights. Under the Secretary's definition, coal owners must not only possess property rights under state law, they must also have received, or applied for, all permits necessary to mine before the proscriptions take effect in order for their property rights to be saved from the proscriptions on new operations.

The all-permits requirement of the VER definition is contrary to the well-established meaning and purpose of that term to avoid the impairment of valid property rights when Congress enacts new laws. Moreover, neither the text nor the legislative history of SMCRA suggests any intent to graft an all-permits stipulation on to the back end of the well-established meaning of VER.

The Secretary's unorthodox definition of VER lacks textual and structural integrity. The all-permits stipulation detaches VER from its historic underpinnings in property rights. The Secretary now maintains that VER for SMCRA is not intended to preserve property rights, but rather an "equitable interest" in regulatory approval. In short, the Secretary's definition rests upon interpretative legerdemain with the meaning and purpose of VER, and is unworthy of any deference.

In addition to its disregard of a well understood meaning of an oft used term, the Secretary's definition of VER displaces state law. Historically, state law has governed both the substantive property rights held by persons, and how disputes over the meaning of those rights are resolved. The solicitude otherwise exhibited by SMCRA to the states in determining the rights of persons in their property is inexplicably ignored by the Secretary in his use of the "all permits" components of the VER definition.

Finally, the Secretary's choice of a VER definition based upon the attainment of a permit guarantees "significant takings implications" as the Secretary acknowledges. Because reliance on the doctrine of constitutional avoidance would resolve this result, the D.C. Circuit's refusal to employ it was erroneous, as was its conclusion about how and where takings claims would be resolved.

Accordingly, the "all-permits" prong of the Secretary's definition of VER should be vacated.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CREATES GRAVE UNCERTAINTY ABOUT THE MEANING OF A WELL UNDERSTOOD TERM OF ART CONGRESS USES TO PRESERVE EXISTING PROPERTY RIGHTS.

A recurring theme "[t]hroughout SMCRA [is] Congress' express[] concern for preserving existing property rights, and for not interfering with state determinations of those rights." *National Wildlife Federation v. Hodel*, 839 F. 2d 694, 757 (D.C. Cir. 1988). This concern finds its primary expression in the VER exception to Section 522(e)'s proscriptions on new surface coal mining operations. The VER savings clause embodies the statutory intent not "to infringe upon valid property rights." *Id.* at 750. Indeed, the term "valid existing rights" is a familiar one with a well-established purpose and meaning—to preserve property rights and interests previously acquired or earned. *See, e.g., Wilbur v. United States*, 280 U.S. 306, 316-18 (1930); *William v. Brening*, 51 I.D. 225, 226 (1925); *Louis J. Hobbs*, 77 I.D. 5, 7-8 (1970).

The Court of Appeals for the D.C. Circuit searched for ambiguity where none existed in order to save a paradoxical definition of VER that is contrary to both the well-understood meaning and purpose of that term. The ruling allows an agency to convert a familiar term intended to preserve pre-existing property rights into one that extinguishes them. The paradox lies in the two parts of the VER definition

that require coal owners: (1) possess a legally binding deed or lease which vests the right to conduct the type of surface coal mining operations intended (e.g, underground or surface mining); *and* (2) obtain, or apply for, all permits necessary to mine–all before the land overlying their coal estates becomes subject to § 522(e). 30 C.F.R. § 761.5.

The Secretary recognized that coal owners, like Amicus' members, own property rights which satisfy the first part of the VER definition. 64 Fed. Reg. 70,794 ("property rights in the lands listed in section 522(e) are already vested under State law."). And, both the Secretary and D.C. Circuit acknowledge that these property rights are destroyed under the second part of the definition because "few persons will qualify for VER under this standard." Pet. App. 4a quoting 64 Fed. Reg. 70,778.

Consider the fate of the owners of coal estates created before SMCRA's enactment (August 3, 1977), but whose plans to exercise those rights (*i.*e., seek all permits) did not precede SMCRA's designation of the surface as section 522(e) lands:

- *National Forests*: The Secretary of Agriculture acquired vast areas of land under the Weeks Act of 1911, 16 U.S.C. §§ 515 *et seq*., which later were included in the National Forest System. In order to acquire more acreage for less money, the government often purchased only the surface, leaving the mineral estate, including the coal, subject to a reservation held by the grantor. *Bellville Mining Company v. U.S.*, 999 F. 2d 989, 991 (6th Cir. 1993). Section 522(e) prohibits

surface coal mining in National Forests east of the 100th Meridian, and only allows surface activities in connection with underground coal mining if the Secretary determines that the government's economic or other values for those lands are compatible with the coal owner's surface operations. 30 U.S.C. § 1272(e)(2). Coal owners in eastern states who possessed the right to surface mine prior to SMCRA's enactment are stripped of their rights to mine. Coal owners who have the right to conduct underground mining, including using the surface necessary for such operations, must now seek the surface owner's (*i.e.*, the Secretary's) permission to exercise the very rights they reserved when they conveyed the surface to the government.

- *Wilderness Areas*: The same land purchased under the Weeks Act may have later become designated wilderness subject to the Wilderness Act. 30 U.S.C. § 1272(e)(1). *See, e.g., Otter Creek Coal Company*, 224 Ct. Cl. 697 (1980). Surface mining as well as any surface activities associated with underground coal mining are absolutely barred.

- *Occupied Dwellings*: Surface mining activities and surface activities associated with underground mines cannot, absent consent from the dwelling owner, occur within a 300-foot radius around a dwelling (about 7.5 acres for a 1500 square foot dwelling). Owners of the coal estate are forced to reacquire from the owner of the dwelling their rights to surface mine or use the surface for the ancillary activities (e.g., roads,

parking lots for employees, power lines) necessary for either surface or underground coal mining.

A similar fate awaits all owners of coal in the future as well. Should the government acquire the surface overlying their coal for a park, recreational area, or national forest, or designate a historic site, *see, e.g., Ainsley v. United States*, 8 Cl. Ct. 394 (1985), the coal estate beneath the park or forest is lost and its economic value extinguished. Likewise, should a surface owner of land construct a dwelling, or move a mobile home onto the land where the coal estate is separately owned, the coal below is effectively condemned. The Secretary's definition of VER invites, now with judicial approbation, the continual condemnation of Amicus members' property interests.

No other natural resources owners whose property interests are affected by changes to federal land laws are denied the use of their property interests simply because they did not manifest their intent to convert them to economic gain prior to enactment of the new law. Other statutes have withdrawn lands from certain uses, but preserved existing property rights through a VER savings clause. *See*, e.g., Federal Land Policy Management Act of 1976 (FLPMA), Pub. L. 94-579, § 701(h) (codified at 43 U.S.C. § 1701 note); Wilderness Act, 16 U.S.C. § 1133(d); Wild and Scenic Rivers Act, 16 U.S.C. § 1280; Mining in the Parks Act, 16 U.S.C. § 1902. Yet, none those laws have been construed to limit their VER protections to those property owners who had obtained or applied for permits prior to the enactment of the new law. *Skaw v. United States*, 740 F. 2d 932, 940 (Fed. Cir. 1984) (lack of a permit does not defeat property owner's

valid existing rights to mine). *See also The Wilderness Society v. Dombeck*, 168 F. 3d 367, 375 (9th Cir. 1999) (mining claims in Wilderness areas); *Colorado Environmental Coalition v. Bureau of Land Management*, 932 F. Supp. 1247, 1249 (D. Colo. 1996) (oil and gas lease in Wilderness Area).

Valid existing rights, a ubiquitous term of art used in numerous federal laws, is rarely defined in the statute. Neither before nor after this rulemaking has the absence of a definition presented an obstacle to readily ascertain the term's common and well-accepted meaning. It is one grounded in property rights. The Secretary was able to discern VER's meaning in FLPMA, enacted the year before SMCRA, notwithstanding the lack of a definition and "legislative history [which] is largely silent on the scope of this term." *Wilderness Review and Valid Existing Rights*, 88 I.D. 909, 911, (1981). Relying upon the extensive history of the term's interpretation by the Department and the courts, *Id.*, the Secretary concluded that VER saves existing rights and interests from changes made by the new law that "would preclude recognition of the right or . . . would preclude development under the right." *Id.* at 913.

Nor did the meaning of the phrase "subject to valid existing rights" prove elusive to the Secretary in implementing a proclamation issued almost twenty years after SMCRA creating the Grand Staircase-Escalante National Monument. In a decision issued just one month before the SMCRA VER rule, the Secretary interpreted the phrase "subject to valid existing rights" as reflecting the "intention to honor

rights that existed prior to the establishment of the Monument." *Grand Staircase-Escalante National Monument Management Plan*, at 50 (Nov. 1999).[3] For natural resource owners their "activities on existing mineral leases and mining claims will be governed by VERs [which] generally involves rights to explore, develop and produce within the constraints of laws and regulations." *Id.* at 51.[4]

There is no indication in SMCRA that when it comes to the meaning of VER that the past would not be prologue. After all, when Congress uses a term of art with an accumulated settled meaning, it is presumed that Congress intended to incorporate that established meaning. *Morissette v. United States*, 342 U.S. 246, 250 (1952); *National Treasury Employees Union v. Chertoff*, 452 F. 3d 839, 857 (D.C. Cir. 2006).

The panel, however, treats a "term of art" not as a tool for discerning meaning, but rather as an invitation to find ambiguity. Pet. App. 10a ("If VER operates as a term of art . . . it is a tool by which Congress delegates policymaking authority through ambiguity."). This approach to statutory construction can only follow from a dangerous view that *Chevron* and its progeny provide license to skip the traditional

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[3] Available at http://www.ut.blm.gov/monument/docs/planning-NEPA/Monument-Plan/plan.pdf.

[4] This interpretation of VER, which is in accord with its well-established meaning, preserves the property rights in 68 mining claims, 85 oil and gas leases and 18 federal coal leases, *id.* at 51, in a Monument described as an "unspoiled natural area," *id.* at i.

tools—text, structure, purpose and context—and embark upon a journey through definitional possibilities.

Context alone would have served the D.C. Circuit well here. If the absence of the word "property" in the phrase VER gives pause to embracing the term's conventional meaning, Pet. App. 9a-10a, reference to its place in the statute readily instructs that VER's meaning is grounded in "property" rights. Like its antecedents in other federal laws, SMCRA's VER clause appears in a provision that restricts the future use or acquisition of property. With this context as a guide, only the panel's distraction with abstracting a single word—rights—accounts for acceptance of an interpretation that divorces VER from "property." *Compare* Pet. App. 9a ("The word 'right' instead of answering a question, unhelpfully asks another one [] which is equally unhelpful because it requires yet another question.") *With National Wildlife Fed'n*, 899 F.2d at 750 (Section 522(e) VER clause evinces Congress' intent not "to infringe on valid *property* rights." (emphasis supplied)); S. Rep. No. 95-128, at 56 (1977) ("all valid existing *property* rights must be preserved" and there is "no intention whatsoever, by any provision to change such rights.").

Statutory structure further confirms the flaw in the manner the D.C. Circuit deployed *Chevron*. As Petitioner points out, when Congress intended to provide a narrower protection of rights by conditioning them upon attaining regulatory permits, it did so expressly. Pet. 24. Indeed, this structural guidance arises directly from the statutory provision at issue.

Congress provided a focused but narrow protection from the discretionary mining prohibitions of Section 522(a), 30 U.S.C. § 1272(a)(6) by creating a permit based exemption. In comparison the distinct and broader protection—valid existing rights—arises in those instances of the mandatory prohibitions found in § 522(e), *id.* at § 1272(e). Purposefully including of the narrower permit-based exemption in Section 522(a), while excluding it and substituting VER in Section 522(e) should alone disqualify the Secretary's permit-based VER definition as a permissible construction of the statute. *See Russello v. United States*, 464 U.S. 23 (1983).

Contrary to the D.C. Circuit's suggestion, there is nothing "too complicated to understand" when it comes to the meaning of VER. Pet. App. 11a (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527. 545 (1947). Because Section 522(e) was self-executing upon SMCRA's enactment and VER already had a settled meaning in federal law, there is no reason to suppose that Congress left this matter for the agency "in order to find out what it means." *Id.* Rather, Justice Holmes' admonishment is closer to the mark: "The law uses familiar legal expressions in their familiar legal sense." *Henry v. United States*, 251 U.S. 393, 395 (1920). There is no basis for concluding that VER under SMCRA takes on a wholly different meaning than the one that Congress both understood and knew to avoid the impairment of pre-existing property rights when it enacts new laws.

## II. THE DECISION AUTHORIZES FEDERAL AGENCIES TO DISPLACE BOTH THE SUBSTANCE AND ROLE OF STATE LAW IN DEFINING PRIVATE PROPERTY RIGHTS

Our federal system leaves to the several States control over property ownership and the rights of its owners in relation to the state or private parties. This Court has consistently held that state law governs in this area especially with respect to real property. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944). The decision below conflicts with this venerable principle in terms of both the substantive law that controls and the constitutional sovereignty of the States in determining those rights under their body of statutes and decisions.

SMCRA exhibits special solicitude to States when it comes to the substantive law that governs the legal relationship between coal and surface owners as well as the States' interests in resolving such questions. *See, e.g.*, 30 U.S.C. § 1260(b)(6)("[S]urface-subsurface legal relationships shall be determined in accordance with State law."). Even when it serves as the regulatory authority in a state with privately owned coal, the federal government is barred from adjudicating any property disputes. *Id.* ("[N]othing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes."); *see also id.* § 1257(a)(9).

Prior to the promulgation of the VER regulation, the rights a coal owner possessed in relation to the surface owner were routinely determined pursuant to principles of state common law in state courts. Now superimposed upon state law is a federal test that compels a coal owner – even one, such as Amicus' members, who are not in the business of actually constructing mines – to have acquired all permits necessary to begin mining before those rights are deemed to exist. Because mining permits are not sought until a sufficient market arises to justify production, coal owners do not secure permits for their coal estates as a matter of routine.

Nevertheless, the permit component of the VER test now makes that authorization the only part of the VER definition that possesses meaning. The rights in the property, however ancient or limited by state law, have no value unless, by pure serendipity, they were combined with permit applications before Section 522(e) takes hold. The great body of State law that governs the acquisition, retention and transfer of property, and defines the relative rights of private parties, has been relegated to a secondary and largely formalistic status. In its place is now a federal scheme that gives recognition only to the fortuitous owners who reach the doors of numerous permitting agencies before the surface overlying their coal estates is subjected to the prohibitions imposed by Section 522(e) lands.[5]

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[5] Because the Secretary advised that permit applications were the *sine qua non* for VER two decades after SMCRA's enactment, this federally-sanctioned race to the doors of permitting agencies was over before it began for owners of coal estates under lands with Section 522(e) features when SMCRA was enacted. Even for coal underlying lands presently

It is difficult to conceive of a greater indignity imposed upon state sovereign interests than effectively replacing its substantive law and role over private property rights by a federal regulation promulgated decades after the passage of the statute purporting to sustain sate created rights. SMCRA does not compel such a result and our federal structure cannot accommodate it. This Court should intercede before such mischief gains a foothold and spreads elsewhere.

## III. THE D.C. CIRCUIT INCORRECTLY DECLINED TO EMPLOY THE CANON OF CONSTITUTIONAL AVOIDANCE IN ITS ANALYSIS.

The permit-based VER definition assures that the statute and the Takings Clause will clash. The Secretary acknowledged that his interpretation "has significant takings implications," 64 Fed. Reg. 70,827, while the traditional one does not, *id.* at 70,826. No doubt, similar concerns informed this Court's assessment that the 1999 rule's predecessor incorporating an all-permits condition "is not compelled either by the statutory language or its legislative history." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 n. 37 (1981).

If there is a time for the canon of constitutional avoidance to be employed it is now. The D.C. Circuit

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unencumbered by Section 522(e) features, the self-executing nature of the provision precludes advance notice that the coal estate is in jeopardy of extinguishment.

thought otherwise, finding no identifiable class of takings victims warranting its use. J.A. 16a. Amicus members' appeared below and fully described how its property interests are extinguished by the rule. And again, the Secretary stipulated in the rulemaking that the rule had significant takings implications. Nevertheless, the panel surmised incorrectly that the rule would have "relatively insignificant takings implications." Pet. App. 16a.

The panel's error was further compounded by its misapprehension of SMCRA's structure. It assumed that any takings implications "can be readily addressed in the Court of Claims." *Id.* Not so. The Secretary's interpretation of VER must be adopted by the states in order for them to maintain their exclusive jurisdiction to regulate coal mining under SMCRA. 30 U.S.C. § 1253(a). And once a state does so, the rule becomes state, not federal, law. *See Pennsylvania Federation of Sportsmen's Club, Inc. v. Hess*, 297 F. 3d 310, 316 (3d Cir. 2002); *Bragg v. West Virginia Coal Association*, 248 F. 3d 275, 295 (4th Cir. 2001). As a consequence, insofar as the proscriptions related to private and state lands described in Section 522(e)(3)-(5), a compensation remedy, if available, will be sought from states in state court—not in the Federal Claims Court under the Tucker Act, 28 U.S.C. § 1491(a), as the D.C. Circuit assumed. *See* Pet. App. 15a.

Of course, if the price to maintain their role as exclusive regulators becomes too steep, states can opt-out of SMCRA. Surely, Congress did not intended to impose these terms on states in choosing whether to assume the responsibility for

implementing SMCRA. *See* 30 U.S.C. § 1201(f). Because SMCRA vests the D.C. Circuit with exclusive jurisdiction to review national rules like this one, 30 U.S.C. § 1276(a)(1), absent this Court's review, the ruling below could inflict permanent harm to SMCRA's federalism design.

## CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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